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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO RULE 24.1, ARIZ. R. CRIM. P.** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, respectfully files this Response to Defendant's Motion for New Trial Pursuant to Rule 24.1, Arizona Rules of Criminal Procedure. Defendant's Motion should be denied. The State has not engaged in prosecutorial misconduct; any error or mistake on the part of the State was unintentional and did not affect the jury's verdict as there was ample evidence of Defendant's guilt. The State's position is set forth in the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

History of the Case:

Defendant was indicted by the grand jury on February 3, 2010, almost four months after the deaths of James Shore, Kirby Brown and Lizbeth Neuman. Since that date, the State has disclosed over 8,000 pages of documentary evidence, close to 150 audio recordings and over 1600 photographs.

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Almost from the day of the indictment it became clear to the State that the adversarial tone that is present to some degree in all prosecutions would be amplified in the instant case. On March 11, 2010, prompted by disputes before this Court regarding the content or context of verbal conversations between the State and Defendant, the State informed Defendant all future communications would be in writing.

Since Defendant was indicted, over 200 pleadings have been filed by the parties in this matter (excluding disclosure statements and notices of appearance). Trial commenced on February 16, 2011 and continued through June 30, 2011. During the trial, the State called 33 witnesses in forty-three trial days. Over 900 exhibits were marked and over 500 were admitted during the trial. Throughout the trial and continuing up to the instant motion, the State was repeatedly accused of misconduct and error. The State lost count of the number of times Defendant urged this Court to declare a mistrial in his repeated efforts to keep the determination of guilt from the jury. On June 22, 2011, the jury found Defendant guilty of the lesser included charge of negligent homicide for each of the three victims.

The Defendant's frequent, unfounded attacks on the integrity of the State throughout this trial have been difficult to silently endure as the State repeatedly made the conscious decision to refrain from responding in kind. The risk in this approach is that the finder of fact – this Court – comes to believe the allegations to be true due to the repetitive and recurring nature of the accusations. "Proof by repeated assertion" is a logical fallacy and cannot be substituted for the truth. The State would simply ask this Court to review the record objectively as a minister of justice and to disregard Defendant's continued aggressive efforts to portray every word spoken or action taken by the State as having some unethical or sinister motive. The record does not support the allegations of prosecutorial misconduct; to the contrary, the record in this case clearly shows

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that the State's inadvertent errors were made over the course of a lengthy and contentious proceeding, without any intent to cause a mistrial or achieve a verdict on any basis other than the evidence that was presented to the jury.

The Law:

"Motions for new trial are disfavored and should be granted with great caution." *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996); *State v. Rankovich,* 159 Ariz. 116, 121, 765 P.2d 518, 523, (1988). "Trial by jury is one of the most treasured guarantees of the Bill of Rights. Any interference with the jury's province must be exercised punctiliously." *State v. Clifton,* 134 Ariz. 345, 349, 656 P.2d 634 (App. 1982).

Rule 24.1(c), Ariz. R. Crim. P., sets forth the grounds on which a court may order a new trial. Prosecutorial misconduct is included within the grounds upon which a trial court may grant a new trial or aggravation or penalty hearing. *Rule 24.1(c)(2), Ariz. R. Crim. P.* As noted in the comment to the Rule, "[t]he harmless error rule is applicable" to all of the grounds set forth in the rule, including prosecutorial misconduct.

"Misconduct alone will not mandate that a defendant be awarded the new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Jones,* 197 Ariz. 290, 305, 4 P.3d 345, 360 (2000) (quoting *State v. Hansen,* 156 Ariz. 291, 296-97, 751 P.2d 951, 956-957 (1988)). The Arizona Supreme Court has expressed great reluctance "to reverse a conviction on grounds of prosecutorial misconduct as a method to deter such future conduct." *State v. Towery,* 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996). Thus, defendants claiming prosecutorial misconduct are accorded retrial only in very extreme cases. *See State v. Hughes,* 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998) ("To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so

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infected the trial with unfairness as to make the resulting conviction a denial of due process.'"). "The misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (quoting *State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992). "Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris,* 215 Ariz. 324, 335, 160 P.3d 203, 214 (2007) (quoting *State v. Anderson (Anderson II),* 210 Ariz. 327, 340 ¶ 45, 111 P.3d 369, 382 (2005)).

"Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar,* 217 Ariz. 235, 238-239, 172 P.3d 423, 426-427 (App. 2007) quoting *Pool v. Superior Court,* 139 Ariz. 98, 108-109, 677 P.2d 261, 271-272 (1984).

> In determining whether the prosecutor acted intentionally, knowing his conduct to be improper, and in the pursuit of an improper purpose without regard to the possibility of causing a mistrial, the trial court looks to objective factors, including 'the situation in which the prosecutor found himself, the evidence of actual knowledge and intent[,] . . . any other factors which may give rise to an appropriate inference or conclusion,' and 'the prosecutor's own explanations of his 'knowledge' and 'intent.'

State v. Trani, 200 Ariz. 383, 384, 26 P.3d 1154, 1155 (App. 2001).

Prosecutorial error and prosecutorial misconduct are not synonymous. The Arizona Supreme Court has drawn "an important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *State v. Minnitt,* 203 Ariz. 431, 438, 55 P.3d 774, 781 (2002) (citing *Pool v. Superior Court,* 139 Ariz. 98, 105-107, 677

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P.2d 261, 268-270 (1984)). The Court has "also stated that '(m)isconduct alone will not cause reversal' and that 'a new trial should not be granted to punish counsel for his misdeeds, but (only) where the defendant has been denied a fair trial as a result of the actions of counsel.'" *State v. Sustaita,* 119 Ariz. 583, 592-593, 583 P.2d 239, 248-249 (1978).

Argument

Defendant alleges the State engaged in ten separate forms of prosecutorial misconduct. However, a review of the allegations reveals that either (1) no misconduct occurred in any way or (2) if a mistake was made, there has been no showing of prejudice to Defendant. As this Court is aware, the State has admitted isolated mistakes during this case; however, as noted above, there is a legal and significant difference between prosecutorial error and misconduct "so egregious that it raises concerns over the integrity of the trial." *Minnitt, supra.*

Each of the allegations from Defendant's motion is addressed below.

A. The disclosure dispute relating to the December 14, 2009 meeting was resolved prior to trial, and all of the information was disclosed and used by Defendant during trial.

There is no doubt that there was a legal dispute between the parties as to whether the work product doctrine applies to a pre-indictment meeting between the State, the investigating agency and the medical examiners, and whether the meeting was subject to disclosure. Ultimately, the issue was extensively briefed and argued. On September 20, 2010, the State was ordered to disclose all of the information requested by Defendant. The State promptly complied with this Court's order and provided to Defendant any and all notes of the prosecutors and other participants taken at the meeting. Following the State's disclosure, Defendant re-interviewed the

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medical examiners and representatives from the Yavapai County Sheriff's Office who were present at the meeting.[1]

During the trial, Defendant repeatedly referred to what he characterized as a "secret meeting" during the examination of the Dr. Lyon and Detective Diskin. Defendant emphasized the "secret meeting" during his closing remarks during the guilt phase of the trial:

> I'm going to tell you something. We don't have secret meetings in the United States of America when this is involved. Maybe if you're in charge of SEAL Team 6 and you're going to go capture or kill a terrorist, that's a good idea for a secret meeting. Okay?
>
> But if we're talking about the criminal justice system, if we're talking about a man's rights and whether he should be charged, whether a man should be charged with a criminal offense, and we're talking about the evidence. That's not a secret meeting. You answer. That's what that book requires. You're the government.

Exhibit A, Trial Transcript, 6/17/11 at 46:21-47:11.

The State can find no authority for Defendant's argument that when a defendant receives full disclosure of material that was subject to a discovery dispute resolved months before the start of trial and uses the information during trial and closing arguments, he has suffered any prejudice during trail. Moreover, although the State's argument that the materials presented at the meeting were protected by the work product was rejected by this Court, case law makes it clear that the fact that the medical examiners were provided information from the State relating to the circumstances surrounding the death of the victims was not improper.

In *State v. Morris,* 215 Ariz. 324, 160 P.3d 203 (2007), the defendant made multiple allegations of prosecutorial misconduct including a claim that the prosecutor had improperly influenced the medical examiners investigating the deaths of the two victims by providing them

[1] The State also allowed the defense to re-interview Dr. Mosley, even though the State had permitted full questioning of Dr. Mosley about the meeting during Dr. Mosley's first interview.

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with copies of statements the defendant had made to the police. The Arizona Supreme Court rejected this claim and noted the following:

> Arizona statutes permit medical examiners to receive information about the circumstances surrounding a suspicious death. Arizona Revised Statutes section 11–593.B (2001) requires a peace officer to report the results of "an investigation of the facts and circumstances surrounding [a suspicious] death" to the county medical examiner. Moreover, the medical examiner is statutorily required to "[m]ake inquiries regarding the cause and manner of death." A.R.S. § 11–594.A.4 (2001); *see also id.* § 11–594.A.2. The prosecutor did not, therefore, engage in misconduct by giving transcripts of Morris's statements to the medical examiners. Moreover, the record does not suggest that Morris's statements improperly influenced either of the medical examiners. Both testified simply that they found nothing inconsistent with those statements in their respective autopsies of Codman and Davis, and they acknowledged that, without the statements, they would have believed that drug intoxication caused the deaths. Therefore, this incident does not constitute prosecutorial misconduct.

Id. at 336, 160 P.3d at 215.

Defendant was provided the materials he sought regarding the December 14, 2009 meeting months before trial and used the information in questioning witnesses and in his closing arguments. Defendant suffered no prejudice from the State's conduct in arguing a legal, good faith belief that the work product doctrine did not require disclosure. His claim of prosecutorial misconduct must be rejected.

B. The State did not act in bad faith in seeking proper voir dire of the jury panel.

Defendant claims the State committed prosecutorial misconduct during jury selection. However, a review of the record and the State's pleadings indicates that the State requested this Court allow both parties to conduct oral examination of the prospective jurors, as required by Rule 18.5, Ariz. R. Crim. P. As the State wrote in its pleading titled Request for Compliance with the Mandates of Rule 18.5(d), Ariz. R. Crim. P., "[t]he clear language and intent of the present rule is that each party be given opportunity and reasonable time to question prospective jurors to discover information relevant to challenges and to possibly rehabilitate them." *State v. Anderson,*

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197 Ariz. 314, 321, 4 P.3d 369, 376 (2000). Requesting that the parties comply with the rules of procedures does not constitute prosecutorial misconduct.

During jury selection, Defendant urged this Court to strike any juror who indicated on his written questionnaire that he had a preconceived opinion of Defendant's guilt, without any additional questioning. It was neither error nor misconduct for the State to object to this approach and request that the Court voir dire the potential jurors to determine whether they could be rehabilitated.

> A juror's preconceived notions or opinions about a case do not necessarily render that juror incompetent to fairly and impartially sit in a case. "If a juror is willing to put aside his opinions and base his decision solely upon the evidence, he may serve." *Id.* The trial court can rehabilitate a challenged juror through follow-up questions to assure the court that he can sit as a fair and impartial juror.

State v. Martinez, 196 Ariz. 451, 459, 999 P.2d 795, 803 (2000) (quoting *State v. Poland,* 144 Ariz. 388, 398, 698 P.2d 183, 193 (1985).

The State correctly cited to *Anderson* in noting that a trial court's failure to allow the parties the opportunity to question potential jurors can create reversible error. This was not an erroneous assertion to the Court that the State had due process rights. Moreover, it was not error for the State to assert during trial that the State, like the defendant, had a right to a fair and just proceeding.

Defendant also claims the State engaged in misconduct when it asked potential jurors whether the State and Defendant would start on "an equal playing field" in the juror's mind. Such a question refers only to a juror's ability to judge the evidence objectively whether it is presented by the State or the defendant. For example, in *State v. Blackman,* 201 Ariz. 527, 38 P.3d 1192 (App. 2002), the court upheld the trial court's striking a juror for cause after he indicated "he would give the benefit to the defendants where testimony conflicted" and "would be 'looking for

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reasons to find [defendants] not guilty.'" Clearly, this is an example of the parties not starting on "an equal playing field." This questioning was not misconduct by the State.

Finally, although Defendant urges this Court to sanction the State for making the above argument, he presents absolutely no evidence that the jury was not fair and impartial or that he was prejudiced in any manner by the jury selection in this case. This Court denied the State's request to reconsider the striking of the three jurors referenced to in Defendant's motion; there can be no prejudice that could have resulted from the State's request in that regard.

Defendant's claim of prosecutorial misconduct during jury selection has no legal or factual support and must be rejected by this Court.

C. The Defendant was not prejudiced from the State's late disclosure.

During trial, the State disclosed the e-mail report received from Rick Haddow. Without reiterating the lengthy history related to the disclosure, it is sufficient to acknowledge that the State's failure to timely disclose the report, while inadvertent, was error which this Court found to be a violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). Upon its finding of the violation, this Court granted Defendant's request for a continuance to interview Mr. Haddow and to call him as a witness, or to call another witness, to testify as to what Defendant characterized as the exculpatory information in his report. This Court denied Defendant's motion for a mistrial.

As trial resumed, Defendant made mention of Mr. Haddow's report in his cross-examination of Debra Mercer and Michael Hamilton. He then questioned Detective Diskin regarding the late disclosure of the report and the Court's finding of a Brady violation. In response, the State questioned Detective Diskin regarding what he told Defendant about carbon dioxide during his defense interview and what he learned from the Haddow email regarding carbon dioxide. In light of Defendant's continued misrepresentation of the content of the Haddow

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report, the State requested it be allowed to call Mr. Haddow as a witness. During this time, Defendant continued to re-urge his motion for mistrial. On May 9, 2011, this Court made the following ruling:

> The Court concludes that preclusion of Richard Haddow as a State's witness is an appropriate and necessary sanction for the *Brady* violation. Under the circumstances presented in this case, the State cannot withhold or fail to disclose information that is plainly subject to mandatory disclosure requirements under both constitutional principles and the rules of procedure and then selectively use related potentially inculpatory information to its benefit at trial. The *Brady* violation, which this Court has determined can be remedied short of mistrial, however, does not allow the Defendant to present information in the Haddow report in a manner contrary to the rules of evidence. The motion to preclude Mr. Haddow as a State's witness is granted.
>
> The Court concludes that the other sanctions urged by the Defendant are not warranted. The Defendant apparently has chosen not to call Mr. Haddow as his own witness for purposes of presenting any exculpatory information contained in the report and does not wish to obtain another expert witness to address any issue involving sweat lodge construction. Furthermore, as has been noted in court, in a motion pleading regarding the *Brady* violation, and in argument by counsel, issues concerning the potential significance of carbon dioxide and of the location of the participants in the sweat lodge have been known to the parties for months prior to the commencement of trial.

Rulings on Pending Matters, 5/9/11 at 2.

In *State v. Roque,* 213 Ariz. 193, 141 P.3d 368 (2006), the Arizona Supreme Court found that the State's failure to disclose the extent of the State's expert testimony on the central issue in this capital case was error. During trial, the trial court had found the failure to disclose the testimony was not a disclosure violation, but nonetheless proposed a recess to allow the defense to interview the expert. The defense declined to do so. *Id.* at 210, 141 P.3d at 385. On review, the Arizona Supreme Court found the State had engaged in improper conduct, but "because the trial court imposed an appropriate initial sanction that the defense refused to accept," the Court found it was not reversible error. *Id.* at 211, 141 P.3d at 386. In addition to addressing the non-disclosure as an individual issue, the Court also addressed the defendant's claim that twenty-eight

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incidents of prosecutorial misconduct, including the disclosure violation, denied him a fair trial. *Id.* at 228, 141 P.3d at 403. Ultimately the Court found three incidents that merited the Court's assessment of cumulative prosecutorial misconduct and concluded as follows:

> Under the *Hughes* test, we cannot say that the cumulative effect of the misconduct here so permeated the entire atmosphere of the trial with unfairness that it denied Roque due process. We recognize in particular that the prosecutors' failure to disclose the scope of Dr. Ben–Porath's testimony was improper and potentially prejudicial, but the defense did not make a good faith effort to resolve that discovery dispute. As a result, we cannot now assess the prejudice the defendant may ultimately have suffered. The cumulative effect of the incidents of misconduct in this case thus does not warrant reversal. *See id.* at 80, ¶ 32, 969 P.2d at 1192.

Id. at 230, 141 P.3d at 405.

In the instant case, the Defendant was granted a continuance to interview and to call Mr. Haddow, or another expert, as a witness to present his exculpatory findings to the jury. He elected not to do so and instead he used the State's violation to imply to the jury that the State had concealed exculpatory information. Defendant had the opportunity and did question witnesses regarding the Haddow report and in doing so, misrepresented Mr. Haddow's findings and conclusions. The State was not allowed to call Mr. Haddow as a witness to respond to the misrepresentations of the defense. Given these facts, there is no evidence that Defendant suffered prejudice from the State's late disclosure of the Haddow report.

Defendant also claims the State committed a *Brady* violation when it did not disclose information relating to Rick Ross's "violent deprogramming" activities. As noted in Defendant's motion, Mr. Ross had been disclosed as an expert witness and the State had disclosed his resume and provided notice of his prior felony conviction. At Defendant's request, an interview was conducted with Mr. Ross and the defense questioned him extensively regarding his past history, including what Defendant characterizes as his "violent deprogramming" activities. Until the

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interview, the State had no information relating to these activities which occurred in the 1980s or 1990s. It is not clear why Defendant believes the State had this information in its possession or control. It is also not clear how Defendant can claim that any prejudice resulted from the State not seeking out this information when Defendant had the opportunity to interview Mr. Ross prior to trial and clearly had possession of this information at that time of the interview. In any event, the State did not call Mr. Ross, so there can be absolutely no prejudice relating to any disclosure issues with this witness.

Defendant makes additional allegations of *Brady* violations on the part of the State. Specifically, Defendant claims the State failed to timely disclose a discussion with a NMS laboratory employee on February 25, 2011 regarding the reliability of the testing for organophosphates on the blood of Kirby Brown and James Shore, failed to time disclose that Dr. Mosley had opined to the State that testing the blood of Lizbeth Newman would be "foolish" and akin to a "shot in the dark," and failed to timely disclose that the State had contacted DPS Lab criminalist Dawn Sy and learned that in order to test for organophosphates she would have to conduct further research and testing. Defendant misrepresents the context of each incident in order to attribute some evil intent on the part of the State. No such intent exists or is supported by the record in this case and there is no evidence that Defendant was prejudiced by the State's actions.

State's Contact with NMS Laboratories

As this Court is aware, the State did not know of the organophosphate defense until the interview of Dr. Paul on January 31, 2011, sixteen days prior to the start of trial. Following that interview, the State requested that the blood samples of Kirby Brown and James Shore be tested for organophosphates. On February 4, 2011, the State disclosed a Fax Transmittal Letter Sheet

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from Detective Diskin to Cindy Ross at the Yavapai County Medical Examiner's Office requesting she send specimens from James Shore and Kirby Brown to the AIT Lab for testing. Accordingly, Defendant was on notice the State had requested the tests. On February 15, 2011, the State received and disclosed the results of the tests, which had been completed by NMS Labs, indicating no organophosphates had been detected. The State disclosed the results and added a toxicologist from NMS Labs (to be identified) to its witness list.

On February 23, 2011, Ms. Durrer contacted NMS Lab to determine who the appropriate trial witness would be and the process necessary to arrange his appearance at trial. Later that day, NMS called Ms. Durrer back and indicated that Dr. Blum wanted to discuss the test results with the prosecutor. A telephonic discussion was set for February 25, 2011 at 7:00 a.m.

On Friday, February 25, 2011, Deputy County Attorney Bill Hughes conducted the call with Dr. Blum and learned of his concerns relating to the stability of organophosphates in the blood due to the passage of time. The call took place while Mr. Hughes was riding in the car on the way to the courthouse for trial. Dr. Blum also indicated that the manner in which the specimens were stored could also be a factor. The following Monday, Ms. Durrer contacted Ms. Ross at the Yavapai County Medical Examiner's Office to determine how the blood had been stored and whether additional specimens might have been frozen and preserved that could be tested. Ms. Ross then contacted Dr. Blum to discuss the possibility of testing for organophosphates in frozen tissue. (See Defendant's Exhibit S.) On March 2, 2011, the State disclosed Dr. Blum's concerns to Defendant in a hand-delivered letter. Even assuming *arguendo* the delay in notifying Defendant was too long, the record is clear that Defendant suffered no prejudice as a result.

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It is clear from the record that Defendant knew the blood test results would not be valid. As Mr. Li told this Court, he had documentation in his file that the toxin would only remain in a person's system for three days. *See Exhibit B, Partial Trial Transcript*, 4/29/11 at 59:21-60:4. This information and the fact that the blood of the victims was not tested during the period where an accurate result would be possible was not only presented to the jury during trial, it was one of the factors that Defendant used to argue that a *Willits* jury instruction was appropriate. In Defendant's Request for *Willits* Instruction Defendant stated the following:

> Similarly, trial testimony supports the conclusion that testing of the decedents' blood samples – at a time when organophosphates could still be detected – was material and potentially exonerating. Trial testimony has indicated that organophosphates can be detected in blood; that the testing must be done soon after the exposure; and that testing done in February 2011, approximately 17 months after the accident, was too late to be reliable. "Because tests were not made which could have been made, and because it cannot now be determined whether exculpatory evidence would have been developed," Due Process is implicated and a *Willits* instruction appropriate. *State v. Hannah,* 120 Ariz. 1, 2 (1978).

Defendant James Arthur Ray's Request for Willits Instruction, 6/10/11 at 6.

Given the above record, it is clear that Defendant suffered no prejudice from the State's delay - from February 25 until March 2 - in notifying Defendant that Dr. Blum had concerns regarding the validity of the test results.

Dr. Mosley's opinion of the value of testing for organophosphates in Lizbeth Neuman's blood.

The same analysis is applicable to the e-mail from Dr. Mosley to the Yavapai County Attorney's Office inquiring as to whether he should cancel the testing for organophosphates in Lizbeth Neuman's blood. First, this information was presented to the jury by Defendant during the cross-examination of Dr. Mosley when Defendant admitted the email as Exhibit 1001 and examined Dr. Mosley at length regarding its content. *See Exhibit C, Partial Trial Transcript,*

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5/6/11 at 67:1-70:3. Second, Defendant's attorney Ms. Do then continued her examination of Dr. Mosley to again emphasize to the jury that the State failed to preserve the blood samples taken when Ms. Neuman was admitted to Flagstaff Medical Center. *Id.* at 75:3 – 12. Defendant was able to use this information at trial and used the information to obtain the *Willits* instruction. Defendant has failed to show he was prejudiced by the timing of the State's disclosure of the e-mail.

State's discussion with Dawn Sy regarding testing for organophosphates

Defendant misrepresents the nature of the State's conversation with Ms. Sy and incorrectly implies the State did not call Ms. Sy because it learned potentially exculpatory information during the conversation. As this Court and Defendant knows (and as Defendant knew when he implied to the jury false reasons for the State's decision to not call Ms. Sy as a witness), the State fully intended to call Ms. Sy as witness. The State's conversation in April 2011 with Ms. Sy was in accordance with the standard procedure of contacting a witness prior to their testifying to review the scope of their testimony and to introduce the witness to the prosecutor. Ms. Sy had been interviewed by Defendant prior to her testimony (and apparently more than one time, although not with the State present). Her scientific examination report and all of her notes had been disclosed months before trial.

During the defense interview, Defendant did not question Ms. Sy regarding her ability to identify any pesticides, a trial strategy consistently employed by Defendant during all the defense interviews in order to keep the defense of "organophosphates" hidden from the State. It was not unreasonable for the State, after learning of the organophosphate defense, to inquire of Ms. Sy whether she could test for them. Ms. Sy's response that she would need to inquire further to learn whether testing was possible by the DPS lab was clearly not exculpatory. Ms. Sy never said, nor

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testified, that such testing was not possible, and Defendant was free at any time to inquire the same of her.

Following the April 2011 conversation, Ms. Sy was scheduled to testify on May 6, 2011. She came to the courthouse and remained the entire day waiting to testify. However, Dr. Mosley's testimony took longer than scheduled and Ms. Sy did not take the stand on May 6, 2011. Ms. Sy had a vacation in Hawaii scheduled for the following two weeks. Due to the length of the trial, and because the DPS report and Ms. Sy's notes had been admitted during the testimony of Detective Diskin, and Dr. Dickson had testified about the chemicals identified in the report, the State decided not to call Ms. Sy. Contrary to the false implication made by Defendant both to the jury and in the current motion, this was not an attempt to conceal any information from the defense. The fact that the State had Ms. Sy drive from Phoenix to the courthouse and remain the entire day so she could testify following Dr. Mosley belies this interpretation.

Finally, the State would note that Defendant contacted Ms. Sy directly and had this information prior to her testimony. In fact, Defendant used this information to imply to the jury that the State had attempted to keep her testimony from the jury. In his closing arguments, Mr. Li made the following comments relating to the State's failure to call Ms. Sy:

> Why does Mr. Ray, who doesn't work for the State of Arizona, doesn't have the resources – why is it that Mr. Ray has got to get the state employee in here to testify about what she found in the labs? If it's -- why?
>
> And I just want to point something out. The state in trying answer that question, you will recall – I think you will recall, Ms. Sy, you had vacation plans in Hawaii, didn't you? And you had vacation plans, and it kind of conflicted. And that's why we didn't hear from you. This is vacation. So that's why. The state was just being nice.
>
> How many of you – look at yourselves. You've sacrificed four months here. I know there are some of you who are sacrificing right now who have plans,

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> really important plans, and are sacrificing to do your duty. Okay? To do your duty. You're sacrificing.
>
> But the state – you know – they don't need to call this employee who is going to tell you all this stuff because she had vacation plans kind of got in the way. Forget it. While you're sacrificing here four months.
>
> Is that how you want your government to work? Or is the answer actually that what Dawn Sy had to say isn't very helpful to the case for the state? Is it possible that the state didn't call her because Dawn Sy would give you that real possibility that Mr. Ray didn't kill these folks? How about that? How about it wasn't a vacation plan? How about this looks bad?

Exhibit D, Partial Trial Transcript, 6/17/11 at 60:4 -61:10.

The State would also note that Defendant used Ms. Sy's report and her notes extensively during trial to suggest that there were pesticides present on the tarps that were tested. There was no prejudice to Defendant in the State's non-disclosure of the April 2011 conversation between the prosecutor and Ms. Sy.

State's disclosure of lawsuits

Defendant also claims the State "took a cavalier approach to the disclosure of impeachment evidence throughout trial." This reference is to the lawsuits filed against Defendant from the participants and families of the victims. Throughout the trial, Defendant used the civil complaints filed by the participants to impeach numerous witnesses. Clearly, Defendant had knowledge of and access to the lawsuits that far exceeded that of the State. Defendant also argued in his closing that the lawsuits were a motive for the witnesses to testify against Defendant. Based on the record, there is no evidence that Defendant was prejudiced in any way from the State's failure to seek out information relating to the civil lawsuits filed against the Defendant by the State's witnesses.

Impact of Late Disclosure on the Verdict

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In *State v. Bracy,* 145 Ariz. 520, 703 P.2d 464 (1985), the Arizona Supreme Court considered the defendant's claim that prosecutorial misconduct denied him a fair trial. In its analysis, the Court separated the misconduct into two categories: alleged misconduct involving prosecutorial nondisclosure of evidence and alleged misconduct exclusive of nondisclosure of evidence. *Id.* at 525, 703 P.2d at 469. The misconduct exclusive of nondisclosure included an improper opening statement regarding pretrial identification later ruled inadmissible, an appearance of the prosecutor in a magazine article after the parties had agreed to no media contact, and the county attorney's investigator allowing an incarcerated witness who was to testify against the defendant to be released from jail on multiple occasions to visit his wife for sexual relations. *Id.* The Court found that "no reasonable likelihood exists that the misconduct affected the verdict." *Id.*

Regarding the multiple alleged instances of nondisclosure, the *Bracy* Court identified five instances of non-disclosure that came to light during trial and three instances that were not disclosed until after trial. The Court evaluated the alleged violations under both *Brady* and the Arizona Discovery Rules. Using a *Brady* analysis, the Court found two of the alleged violations were not *Brady* violations because the information was inculpatory and not presented at trial or because the information was inculpatory and consistent with trial testimony. ("Failure to disclose inculpatory evidence is not a *Brady* violation.") *Id.* at 527-528, 703 P.2d at 471-472). Regarding an alleged violation involving photographs of three suspects that were arrested on the night of the murder, the Court found the defendant had objected to their admission and the trial court excluded the photographs. *Id.* at 528, 703 P.2d at 472. The Court concluded that "either the photographs were not exculpatory or defense counsel did not want them in evidence for some other reason." *Id.* Since the trial court sustained the objection and ordered the jury to disregard

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any mention of the photographs, the Court found the defendant did not suffer prejudice from the nondisclosure. *Id.* The Court also considered a police report regarding the arrest of the three men and the failure to disclose benefits given to a witness in exchange for her testimony. The Court noted that this information was revealed during trial and presented to the jury and found no *Brady* violation. *Id.* (citing *State v. Jessen,* 130 Ariz. 1, 633 P.2d 410 (1981).

The *Bracy* Court then reviewed three instances where benefits were provided to two witnesses that were never disclosed to the defendant. The Court found the information had been requested by the defense and therefore, pursuant to *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392 49 L.Ed.2d 342 (1976), evaluated the information to determine whether the suppressed evidence might have affected the outcome of the trial. *Id.* The Court found the information failed to reach the level of materiality required by *Agurs* for two reasons. First, the Court found "the undisclosed evidence was merely cumulative." *Id.* at 529, 703 P.2d at 473. Second, the Court found the evidence presented at trial was "more than sufficient to uphold the convictions." *Id.* Accordingly, the Court found no basis for a new trial under *Brady.*

In reviewing the alleged violations under the discovery rules, the *Bracy* Court reached the same conclusion. *Id.* at 474, 703 P.2d at 474. In the final analysis, the Court, while expressing dissatisfaction with the conduct of the prosecution, found a new trial was not warranted. *Id.*

Bracy, a first degree murder case, involved far more egregious actions then those alleged by Defendant in the instant case. Defendant has failed to show that the verdict would have been different if the information he claims constitutes violations of *Brady* had been disclosed earlier in the proceedings.

D. Disclosure after the Disclosure Deadlines

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Rule 15.6(d) provides that "[a] party seeking to use material and information not disclosed at least seven days prior to trial shall obtain leave of court by motion, supported by affidavit, to extend the time for disclosure and use the material or information." During trial, the State filed three motions pursuant to the Rule.

On March 14, 2011, the State filed a motion requesting to use information received the previous week relating to Defendant's unauthorized use of The Samurai Game® and Holotropic Breathwork™. Ultimately, this Court denied the request and the information was not used at trial. *See Under Advisement Rulings on State's Motions to Extend Time for Disclosure Filed March 14, March 24, and March 28, 2011.* Because the State was not allowed to use the information during trial, there can be no prejudice found to Defendant. Moreover, because the State sought to use this information through the procedure set forth in Rule 15.6(d), Ariz. R. Crim. P., there was no misconduct on the part of the prosecution in requesting to use this information.

On March 28, 2011, the State filed a motion requesting to use information consisting of the Articles of Incorporation and Annual Lists for James Ray International received from the Nevada Secretary of State's Office.

Regarding this motion, the Court made the following ruling:

> Throughout the trial the Defense has attempted to convey to the jury and to this Court its view of the importance of the legal distinction between Mr. Ray, personally, and the corporation, JRI. The defense cross-examined a witness, who had been employed by JRI at the time of the incident, extensively on the subject of the corporate structure and personnel of JRI. It was through cross-examination by the defense that evidence of the distinction has been presented in this trial. The defense has made no showing of prejudice or surprise resulting from the State's effort to admit additional evidence on the same subject. Although the State may have been able to anticipate that this issue would arise at trial, the Court concludes that the State has made timely disclosure under the circumstances.
>
> The State clarified at oral argument that it seeks to admit evidence of the actual corporate hierarchy or personnel of JRI, and Court concludes that evidence on this point would be relevant and admissible, assuming, as always, that

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> appropriate foundation is provided. The State has not shown, however, possible relevance of all of the articles of incorporation, and, absent such a showing, this latter evidence would be precluded.

Under Advisement Rulings on State's Motions to Extend Time for Disclosure Filed March 14, March 24, and March 28, 2011, 4/19/2011 at 3. As noted by this Court in its ruling, it was Defendant that repeatedly sought to distinguish Defendant from his corporation. The State followed the procedures in Rule 15.6(d), Ariz. R. Crim. P., and the Court found the State "made timely disclosure under the circumstances." This is not prosecutorial misconduct.

On March 24, 2011, the State filed a motion requesting to use information relating to the brands and types of poisons or pesticides used at the Angel Valley Spiritual Retreat Center prior to and during Spiritual Warrior 2009. In the motion, the State informed this Court and Defendant that based on Defendant's opening statement and questioning of witnesses, it was seeking to discover information relating to any pesticides or poisons used at Angel Valley Spiritual Retreat Center. The State also informed the parties that it was seeking to discover information relating to the composition of the logs burned to heat the rocks used during the October 8, 2009 sweat lodge ceremony. Finally, the State informed the Court and Defendant that in response to an inquiry from the State, Amayra Hamilton had sent to the State two e-mails and eleven photographs relating to this issue. On March 30, 2011, the State disclosed a "rough draft" of Detective Diskin's supplemental report documenting his discussion with the Hamiltons on March 21, 2011.

Ultimately, Defendant requested an interview with both of the Hamiltons, which was arranged by the State. Following the interview, Defendant requested a copy of the notebook that the Mr. Hamilton had referred to during his interview. The notebook was provided by the Hamiltons' attorney. Later, Defendant requested digital copies of photographs taken by the Hamiltons in October of 2006. The photographs were admitted as Defense Exhibits 882 and 883.

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During the testimony of the Hamiltons, Defendant used the exhibits to impeach the credibility of the Hamiltons.

Defendant's motion argues the State failed to comply with the rules of disclosure in seeking leave to use information relating to the pesticides used at Angel Valley Spiritual Retreat Center. But as noted above, the State filed the requisite motion under Rule 15.6(d), Ariz. R. Crim. P. Moreover, Defendant had the opportunity and did interview the Hamiltons prior to their testimony and actually used as their own exhibits the information that was disclosed. Given these facts, there can be no basis for a finding of misconduct or prejudice to Defendant.

Finally, Defendant claims the State's request to call Dr. David Kent constitutes prosecutorial misconduct. Dr. Kent contacted the State after learning of the trial in the media. His e-mail to the State was timely disclosed on March 14, 2011 and he was added to the State's witness list. The State, however, did not file a motion pursuant to Rule 15.6(d), and this Court found that was error. This Court further found the admission of this evidence would be prejudicial to Defendant and not consistent with "Defendant's right to and the public's interest in a fair and orderly trial process." *See Under Advisement Ruling on Motion to Exclude Proposed Testimony of Late-Disclosed Witness David Kent,* 5/23/11 at 2-3. Because the Court did not allow the State to call Dr. Kent as a witness and absolutely no mention of his proposed testimony was ever presented to the jury, there can be no finding that the State's disclosure could have influenced the verdicts in this case. Without any impact on Defendant, the State's request to call Dr. Kent as a witness cannot be considered prosecutorial misconduct.

E. There have been no frivolous legal arguments on behalf of the State.

There is no support for Defendant's claim that the State has presented arguments to this Court that were "legally meritless." All of the arguments set forth in the State's pleadings and in

front of this Court have been supported by proper legal authority. Moreover, there is no logical argument that if the State had filed a pleading that was "legally meritless;" that it somehow affected the outcome of the trial. This is the standard necessary to merit a new trial.

F. There has not been a pattern of improper questioning of witnesses.

As noted previously in the State's Response to Defendant's Bench Memorandum on Prosecutorial Misconduct, a review of the record will show the State has consistently strived to present a factual, truthful and complete representation of the circumstances of this case to the jury and to comply with the rulings of this Court. The State incorporates the aforementioned Response into its arguments here. On multiple occasions, the State requested the Court's guidance before questioning witnesses regarding prior sweat lodge ceremonies or other matters. For example, on the redirect of Scott Barratt, the State requested a sidebar to check with this Court before proceeding with a line of questioning relating to what Defendant had told him relating prior sweat lodge ceremonies.

> MS. POLK: Your Honor, specifically the state is seeking guidance about a line of questioning that I would like to pursue. And I don't want to pursue it in front of the jury if the Court is going to order otherwise. But I believe that relevant evidence in this case needs to come in, and specifically that relevant evidence is that there were problems experienced by participants at past sweat lodges run by Mr. Ray.

Exhibit E, Partial Trial Transcript, 3/25/11 at 11:5-13. A similar discussion occurred prior to Mr. Hughes's examination of Ms. Hamilton.

> MR. HUGHES: Your Honor, just for clarification. I'll be doing the examination of Ms. Hamilton. I want to make sure I don't run afoul of the Court's rulings.
>
> I understand obviously I can't ask her about any problems she may have observed any year other than 2009. I had hoped to ask her a little bit just about the general history of when did Mr. Ray start bringing his events to Angel Valley, how many people did he bring each year, questions like that.

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But I will steer away from, not ask any questions about whether there were any problems in those years, anything along those lines.

I just want to make sure I can ask her some questions about the general history of -- of her relationship with Mr. Ray and -- and with the events being held on the property.

THE COURT: Ms. Do, are you – who's going to be cross-examining?

MR. LI: I will. Our position is provided that -- that the witness is instructed by counsel not to blurt out all the various rational – rationalizations for why she did one thing versus another. Because these witnesses, as the Court has seen, do have a tendency to just say whatever, want to get their particular message out there.

And if it's simply did Mr. Ray contract with you in 2003, 2004, 2005, 2006, 2007, 2008 and hold the Spiritual Warrior seminar there, that's fine. But she – she has a tendency to say things like, well – you know – in 2005 we thought there was a problem so we weren't sure whether we wanted to do in 2006.

And I just want to make sure that we don't – you know – inadvertently run into the ruling that the Court has just made.

THE COURT: Mr. Li, you made that point last week, and the state acknowledged that their – with any witness, both sides need to be aware of any – with any witness. And there was something that came up yesterday.

MR. LI: and that's all I -- that's the reason why --

THE COURT: And that's the kind of thing you're talking about.

Mr. Hughes.

MR. HUGHES: Your Honor, in anticipation of Mrs. Hamilton might have been on the stand yesterday, I'd spoken to her the night before and thought this might be the Court's ruling. So I did read her the riot act, so to speak, then. And I will do that again before she gets on the stand, that I will tell her no way, shape, or form do any of my questions ask her about problems or issues that she's had with Mr. Ray in prior years, and that, quite honestly, the Court's ruled that that's not relevant from her and she's not to talk about that.

Exhibit F, Partial Trial Transcript, 4/22/11 at 7:24-10:7.

In Defendant's motion, he refers to two instances during the State's questioning of Detective Diskin the he alleges were improper. The first instance involved the State asking

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Detective Diskin if, during the defense interview of June 16, 2010, he had informed Ms. Do that he believed the "deaths were the result of a combination of heat and carbon dioxide." When Detective Diskin responded affirmatively, Ms. Polk followed up by asking, "Is that consistent with the information that you learned from the man named Rick Haddow?" The following morning, Defendant moved for a mistrial based on the exchange and Ms. Polk explained the questioning as follows:

> MS. POLK: Your Honor, the -- when Mr. Kelly cross-examined Detective Diskin, he had stated to Detective Diskin that you never told Ms. Do in the interview that occurred in June of 2010 about carbon dioxide, did you?
>
> And Detective Diskin had responded, yes. I did.
>
> And then Mr. Kelly had said, well, we can look at a transcript, can't we, and then never went back to it.
>
> My question on redirect was picking up on that line, did you tell Ms. Do in the interview about carbon dioxide, and what did you tell her? But it was simply following up on a question by Mr. Kelly in his cross-examination.
>
> THE COURT: The motion for mistrial is denied.

Exhibit G, Partial Trial Transcript, 5/5/11 at 7:6-21.

What is omitted completely from Defendant's misleading portrayal of the questioning by the State is the fact that Mr. Kelly, on cross-examination of Detective Diskin, had asked multiple questions about Mr. Haddow's report and improperly suggested to the jury that the State was hiding information. Through leading questions, Mr. Kelly informed the jury that the State had made a late disclosure of the report and had been found in violation of *Brady* and sanctioned by this Court. Clearly, this was information that was inappropriate to present to the jury.

Finally, the excerpts from the transcripts cited in Defendant's motion were <u>not</u> in response to the line of questioning of Detective Diskin, but were in reference to the questioning of Dr. Mosley. Defendant's motion states the following: "The Court noted the serious problem posed by

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the questioning. *See Trial Transcript, 5/5/11,* at 102:3-5 ("Ever since the late disclosure of the Haddow report, there has been a real issue, serious issue, in the case."). *Id.* at 104:1-18 ("But I don't know why the state brought up the Haddow report. . . At this point the motion for mistrial is just, essentially, under advisement. . . . The state absolutely must avoid any further suggestion there is some report out there that sanctions some other inculpatory theory that hinges on CO2.")."

A review of the record indicates that the dialogue above occurred during the direct examination of Dr. Mosley relating to his differential diagnosis and should be read in the complete context. The entire paragraph is provided below:

> THE COURT: But I don't know why the state brought up the Haddow report. I know that the state has had their own issues with the defense, essentially, testifying on cross-examination by making a statement and then asking a witness sometimes with knowledge, do you agree that this? Do you know that this? And that was that kind of a question from the other side but directly relating to a Brady situation. They don't really equate.
>
> At this point the motion for mistrial is just, essentially, under advisement. I'm going to continue today.
>
> The issue of CO2. It has been in the case. It was in the Grand Jury transcript to some level. It's been there. The state absolutely must avoid any further suggestion there is some report out there that sanctions some other inculpatory theory that hinges on CO2.

Exhibit H, Partial Trial Transcript, 5/5/11 at 104:1-18.

Similarly, while the ruling referenced in Defendant's motion precluded the State from calling Mr. Haddow as a trial witness, it also noted, as previously mentioned, that the *Brady* violation did "not allow the Defendant to present information in the Haddow report in a manner contrary to the rules of evidence." The Court's ruling also noted that "issues concerning the potential significance of carbon dioxide and of the location of the participants in the sweat lodge

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have been know to the parties for months prior to the commencement of trial." *Ruling on Pending Matters,* 5/9/11 at 2.

Defendant also alleges the State shifted the burden of proof during the direct examination of Detective Diskin regarding whether Defendant had ever questioned any of the State's government witnesses about organophosphates during the pre-trial interviews. Following this questioning, this Court gave a contemporaneous instruction regarding the burden of proof to alleviate concerns that the questions might imply the defense had some obligation to inform the State of its findings; *but the Court also found the State had a proper purpose for the questioning.* "In terms of explaining the investigation, that's fine." *Exhibit I, Partial Trial Transcript,* 4/28/11 at 107:3-4. Following the questioning, the Court provided the jury with a contemporaneous instruction as follows:

> A defendant is always free to challenge the sufficiency of the evidence with respect to an element or issue upon which the State bears the burden of proof, even without any advance notice of intent to do so. A defendant need not provide the prosecutor or the court with a preview of his case or his arguments.
>
> You heard testimony this morning and yesterday regarding when and how the Detective learned about information related to possible organophosphate poisoning. In considering this information, you must remember that the prosecution has the burden to prove all elements of the charged crime beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The burden of proof never shifts to Mr. Ray, the defendant. Mr. Ray is not required to produce any evidence at all.

Exhibit J, Jury Instruction, 4/20/11. Assuming *arguendo* the questioning was error, this cautionary instruction to the jury was more than sufficient to cure any harm that might have resulted in the State's examination of Detective Diskin. *State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (*citing State v. White,* 115 Ariz. 199, 204, 564 P.2d 888, 893 (1977)).

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The Court should consider the State's questioning of witnesses in the context of the entire trial. A review of the record makes it clear the State repeatedly attempted to address both the concerns of defense counsel and this Court in conducting its examination of witnesses. There has been no prosecutorial misconduct in the State's questioning of witnesses during trial.

F. The State never elicited perjured testimony.

Defendant alleges that, by providing witness Mark Rock use immunity for his testimony, the State either knowingly elicited false testimony or "at least" displayed reckless indifference to the risk of doing so." There is absolutely no factual or legal support for this allegation.

Mark Rock was given use immunity for his testimony pursuant to A.R.S. § 13-4064. The statute and the order signed by the Court specifically advise a witness that he may "be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing or failing to produce, evidence in accordance with the order." *A.R.S. § 13-4064.* At the hearing on June 1, 2011, the State advised this Court that it "has not offered nor would we ever offer immunity for perjury on the stand." *Exhibit K, Partial Trial Transcript,* 6/1/11 at 7:3-8. Moreover, attorney Mr. Launders, who had counseled Mr. Rock regarding his testimony, advised the Court that the documents he wanted to file with the Court "did not relate to those types of concerns and a concern that there is an impending perjury, a crime of some sort." *Id.* at 23:7-9. What the record shows is that Mr. Rock was less than candid with the investigators who interviewed him on October 8, 2009. He later came forward with additional information that was disclosed prior to trial and was consistent with his testimony at the 404(b) hearing and at trial.

Mere inconsistency in testimony by a governmental witness does not establish knowing use of false testimony. *United States v. Sherlock,* 962 F.2d 1349, 1364 (9th Cir. 1989). Indeed the

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Rules of Evidence contemplate that differences will exist between trial testimony and prior statements of a witness and expressly authorize the admission of inconsistent statements for non-hearsay use. *Ariz. R. Evid. 801(d)(1).* During trial, Defendant repeatedly used transcripts and recordings of the participants' statements to law enforcement in October of 2009 to impeach their trial testimony. During the testimony of Mark Rock, the use immunity and his prior inconsistent statements were provided to the jury and the jury was free to use this information in assessing the credibility of his testimony.[2] The State neither elicited false testimony nor displayed reckless indifference to the risk of doing so. There was no misconduct on the part of the State in calling Mark Rock as the State's witness.

G. Any error in the State's closing arguments during the guilt phase was promptly addressed by this Court's instructions to the jury.

In arguing a case to the jury, counsel are afforded "wide latitude" and may comment on the evidence and any reasonable inference to be drawn from the evidence." *State v. Amaya-Ruiz,* 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990). Prosecutors, too, have wide latitude in presenting their closing arguments to the jury. "[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *State v. Bible,* 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993).

During the State's closing argument, Defendant made the same objections he makes in his motion for new trial. The objections were properly addressed by this Court. In a few instances, this Court found that an instruction to the jury was appropriate and promptly provided such instruction. There is no evidence that any error on the part of the State was intentional, nor is

[2] The jury instructions explicitly informed the jury they could consider the grant of immunity in

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there any evidence to support that the instruction to the jury was not an appropriate method of addressing the issue. Each of the claims raised by Defendant is addressed below.

Burden Shifting

As noted previously, Defendant had previously objected to the State's questioning of Detective Diskin regarding when he first became aware of the defense theory relating to organophosphates. At the time of the initial objection, this Court instructed the jury as to the State's burden. *See Exhibit J, Jury Instruction, 4/20/11.* During the State's closing argument, Defendant again argued the State was shifting the burden to Defendant in its explanation as to why the investigation did not focus on organophosphates. The State provided the following support for the validity of its argument:

> MS. POLK: And, Your Honor, again, I am – I am arguing the evidence that was admitted at trial. The defense requested, and the Court gave over the State's objection, the Willits instruction on lost, destroyed, or unpreserved evidence. And that instruction to the jury says, if you find that the state has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in the case, you should weigh the explanation, if any, given for the loss or unavailability of the evidence.
>
> That instruction puts the state in a position of explaining what I explained to the jury. All of that information about when it was that the state learned about this defense came out during trial testimony. This – this instruction specifically says to the jury that they can weigh the explanation, if any, given for the loss. And that is what I was arguing to them.
>
> THE COURT: Part of the explanation is is because the defense didn't tell us in time or something, that's burden shifting. That's burden shifting.
>
> What I'd suggest I would do at this point is instruct that the state always has the burden of proof and that instructions -- special instructions I've given throughout the trial in the use of evidence have to be -- have to control the consideration of the evidence.

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assessing the witnesses' credibility.

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Exhibit L, Partial Trial Transcript, 6/15/11 at 52:17-53:20. When the jury reassembled, the following instruction was given:

> THE COURT: I've instructed you that the state always has the burden of proof. There is no burden on the defendant to produce evidence of any kind.

Id. at 59:7-10.

The following morning additional argument was heard on the issue of burden shifting.

> MS. POLK: Your Honor, I'd like to respond to this because this is fair comment on the evidence. Everything I've said is based on the testimony of witnesses in this trial.
>
> When I said – when I explained to the jury why we didn't test for organophosphates, my explanation was that that is something that you have to test for within hours or days, and that was based on the testimony of Dr. Paul.
>
> That was not suggesting that the defense in that first week was supposed to come in and test the evidence. That was the explanation for why the state didn't test for organophosphates and because we learned through the course of the trial that any testing – well, first of all, we didn't test because we didn't know about it.
>
> But secondly, organophosphates, coincidentally, just turned out to be something that if you don't test for immediately, then your tests are not going to be relevant anyway. That was my questioning.
>
> Attorneys in closing argument, Your Honor, are entitled to argue the evidence and comment on reasonable inferences. That's what I'm doing. I can strongly comment on what the evidence is and what it suggests. That doesn't become burden shifting. That doesn't become improper comment. My comments are have been appropriate. I have – everything I have said is based on testimony of the witnesses.

Exhibit M, Trial Transcript, 6/16/11 at 28:11 – 29:16. At the conclusion of the argument over this issue and prior to the State continuing its closing argument this Court again instructed the jury as follows:

> THE COURT: But occasionally I have given some verbal instructions that you are to consider as well. And I'm going to give one that I -- it's really one that I did verbally yesterday. But I'm going to state that a defendant is always free to challenge the sufficiency of the evidence with respect to an element or issue upon which the state bears the burden of proof. Even without advance notice of intent to

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> do so, a defendant need not provide the prosecutor or the Court with a preview of his case or arguments.

Id. at 36:3-13.

"When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify." *State v. Sarullo,* 219 Ariz. 431, 437, 199 P.3d 686, 692 (App. 2008) (citing *State v. Martinez,* 130 Ariz. 80, 82-83, 634 P.2d 7, 9-10 (App. 1981)). "Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." *State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *Id.*

The State's argument was directed toward Defendant's attack on the investigation and was supported by the evidence and the testimony admitted at trial. The argument was clearly appropriate given the Willits instruction that directs the jury to consider the explanation for State's failure to preserve evidence. Nevertheless and assuming *arguendo* the argument may have implied Defendant had the burden of proof, the "cautionary instruction to the jury was sufficient to cure any harm." *Id.*

Vouching

Defendant claims the State engaged in improper vouching when it used the term "we know" during its closing argument. There are two types of prosecutorial vouching. "One involves placing the prestige of the government behind a witness and the other suggests that additional

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unrevealed evidence supports a guilty verdict; both are improper." *State v. Palmer,* 219 Ariz. 451, 453, 199 P.3d 706, 708 (App. 2008). Remarks by a prosecutor that bolster a witness's credibility by references to matters outside the record may also constitute prosecutorial misconduct. *State v. Salcido,* 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984). "In criminal cases, a prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge." *Id.*

During the State's closing argument, the State's use of the term "we know" was addressed. First, the State addressed the issue and advised the Court that the use of the term was inadvertent. *Exhibit N, Partial Trial Transcript 6/15/11* at 49:15-16. Then, the following morning it was addressed by this Court. Specifically this Court noted the following:

> THE COURT: And that's why it's so important to have the context. When I think back with Ms. Polk's references to "we know," there could be a vouching like where we know. I mean – you know – I looked at it as a comment in almost as saying, well, the evidence as shown here in court. That's the way I took it.
>
> MR. LI: No, Your Honor.
>
> THE COURT: If I missed that – I mean, that was the impression I had because I know what vouching is. And to suggest that we have inside information, we wish we could tell you about it, and we really checked this out and we know, that's vouching. I did not take those comments in that vein.

Exhibit O, Partial Trial Transcript, 6/16/11 at 108:13 – 109:2. Later, this Court noted that it did not see the comment as "putting some kind of authority behind it other than a presentation of the evidence." *Id.* at 110:19-23.

The State agrees that "prosecutors should not use "we know" statements in closing argument. *United States v. Younger,* 398 F.3d 1179, 1191 (9th Cir. 2005). However, when the use of the phrase is "employed to 'marshal evidence actually admitted at trial and [to offer] reasonable inferences from that evidence, not to vouch for witness veracity to suggest that

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evidence not produced would support a witness's statements," such statements do not constitute vouching. *United States v. Inzunza,* 638 F.3d 1006, 1024 (9th Cir. 2011).

Finally, the State would note that the jury was repeatedly instructed that the lawyer's comments are not evidence. According to the Arizona Supreme Court, jurors are presumed to follow instructions. *State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Therefore, even if the prosecutor's comments constitute error, the jury instructions help negate or mitigate any deleterious effect. *See State v. Morris,* 215 Ariz. 324, 337, ¶ 55, 160 P.3d 203, 216 (2007) ("Even if the prosecutor's comments were improper, the judge's instructions negated their effect."); *State v. Newell,* 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) ("[T]he superior court instructed the jury that anything said in closing arguments was not evidence. We presume that the jurors followed the court's instructions.").

Misuse of Evidence

Defendant argues that the State played the audio clip of Kirby Brown for an improper purpose. During the State's closing argument, the State played the clip within the following context:

> MS. POLK: And here's what we know about Kirby's frame of mind as she entered the sweat lodge: And we know that the defendant knew this too because this is the statement that Kirby made on Thursday after she had come off the Vision Quest during an open-mic session shortly before entering the defendant's heat-endurance challenge.
>
> (Audio played.)
>
> MS. POLK: So determined was Kirby Brown to learn what she thought Mr. Ray had to teach that for five hours during that Samurai Game she laid there without moving. Mr. Ray knew that. He knew the influence that he had on Kirby and others because Kirby and others took the open mic and made statements like that shortly before they all went into his heat-endurance challenge.

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Exhibit P, Partial Trial Transcript, 6/15/11 at 14:19-15:9. During argument on the issue, the State told the Court it had used the audio for the purpose of understanding Kirby's state of mind as she entered the sweat lodge. *Id.* at 50:11 – 51:1. The limiting instruction that had been read to the jury at the time of the admission of the audio clip was then reread prior to the continuation of the State's closing argument. To the extent that the State's use of the clip was improper, this Court's instruction to the jury cured any error. *State v. Scott,* 24 Ariz. App. 203, 206, 537 P.2d 40, 43 (App. 1975) ("[T]rial court's timely corrective measures were sufficient to prevent the prosecutor's remarks from influencing the jury.")).

Implying Vicarious Liability

As previously noted in this Response, in finding the State had timely disclosed the corporate records of JRI, the Court noted the following:

> Throughout the trial the Defense has attempted to convey to the jury and to this Court its view of the importance of the legal distinction between Mr. Ray, personally, and the corporation, JRI. The defense cross-examined a witness, who had been employed by JRI at the time of the incident, extensively on the subject of the corporate structure and personnel of JRI. It was through cross-examination by the defense that evidence of the distinction has been presented in this trial.

Under Advisement Rulings on State's Motions to Extend Time for Disclosure Filed March 14, March 24, and March 28, 2011, 4/19/2011 at 3.

Regarding Defendant's objections to the State's reference to Defendant's role at JRI, the State explained its purpose in its comments:

> MR. KELLY: And if I could just get the exact question. Mr. Kelly wants you to believe – looking at the chart that I drew, Mr. Kelly wants you to believe that Mr. Ray is not responsible for the conduct of JRI. That was the statement.
>
> MS. POLK: Your Honor, that is not what I recall saying. That is not what I intended to say. My point was that Mr. Kelly drew that corporate diagram trying to remove the defendant from responsibility for what happened in the sweat lodge. And that's what was my intent in illustrating that and then comparing it to what Mr. Ray controlled in the sweat lodge.

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> THE COURT: The – well, I know why the state was presenting that, I would think. And it has to do with arguments that deal with corporate responsibility. And those arguments have been advanced by the defense.

Exhibit Q, Partial Trial Transcript, 6/15/11 at 16:5-23. The comments were a proper comment on the evidence and the extent of the control Defendant exercised over the conduct of the sweat lodge. There was no misconduct in the State's remarks regarding Defendant's position at JRI or his control over the sweat lodge.

"To determine if a prosecutor's comments constituted misconduct that warrants a mistrial, a trial court should consider two factors: (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *State v. Newell,* 212 Ariz. 389, 402, 132 P.3d 833, 846 (2006) (*citing State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992)). "The defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (*quoting State v. Hughes,* 193 Ariz. 72, 79 ¶ 26, 969 P.2d 1184, 1191 (1998). The State requests this Court review the transcripts of the State's closing arguments. While there may have been inadvertent error in the argument, any error was properly addressed by the Court's instruction to the jury. The United States Supreme Court has observed the following relating to a prosecutor's comments during closing arguments:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

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Donnelly v. DeChristoforo, 416 U.S. 637, 646-647, 94 S.Ct. 1868, 1873 (1974).

H. There was no error in the State's rebuttal closing during the guilt phase.

"'Comments that are invited and prompted by opposing counsel's arguments are not improper if they are reasonable and pertinent to the issues raised.'" *State v. Moody,* 208 Ariz. 424, 464, 94 P.3d 119, 1159 (2004) (*quoting State v. Trostle,* 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997). "Prosecutorial comments which are a fair rebuttal to areas opened by the defense are proper." *State v. Alvarez,* 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985); *see also State v. Gillies,* 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983) ("The prosecutor's comments were fair rebuttal to the remarks of defense counsel and were not objectionable."); *State v. Hernandez,* 170 Ariz. 301, 307-308, 823 P.2d 1309, 1405-1406 (App. 1991) ("[P]rosecutorial comments which are fair rebuttal to areas opened by the defense are acceptable.").

Defendant's closing argument was intense and accusatory in tone. Included in the comments were references to "the secret meeting," insinuations that the County Attorney filed charges against Defendant to attract media attention,[3] and even a comparison of the State to Communist Russia.

Following the State's rebuttal close, another motion for mistrial was filed. In the motion, which Defendant incorporates by reference to the instant motion, Defendant makes multiple allegations of improper argument. Regarding the allegations, the State notes the following:

Incorrect Statements of Fact and Inferences Not Supported by the Record.

During the State's rebuttal close, Defendant objected multiple times claiming the State's argument misstated the evidence. This Court promptly responded by instructing the jury that the

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attorney's statements were not evidence. Moreover, this Court agreed with the State regarding one objection relating to Dr. Mosley staying with his original opinion relating to cause of death. *Exhibit R, Trial Transcript, 6/21/11,* 22:3-13.

The State does not agree with Defendant's characterization of the testimony at issue. While the State does not have transcripts of the testimony of Dr. Paul or Ms. Sy, the State's comments relating to their testimony were based on the State's notes and recollection. Furthermore, contrary to the assertion by Defendant, the State did not misrepresent Detective Barbaro's recollection of Defendant's initial response to his question regarding who was in charge of the sweat lodge.

Defendant also claims that the State's comment that blood samples were available to both sides for testing was error. However, the evidence showed not only the blood samples, but the soil samples, rocks, tarp samples and wood samples were available for testing. *See State ex rel. McDougal v. Corcoran,* 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (Prosecutor's comment that breath sample was available to the defendant to test was proper "comment on the defendant's failure to present exculpatory evidence.")) The State's argument accurately reflected the evidence in this case and was a proper response to Defendant's attack on the investigation. *See State v. Zinsmeyer,* 222 Ariz. 612, 621, 218 P.3d 1069, 1078 (App. 2009) (The defendant "cites no authority and we find none, suggesting a prosecutor may not respond to a defendant's argument that law enforcement's investigation of a crime was inadequate. There was nothing improper in the prosecutor's argument.")).

[3] This inference was made even though Defendant knew the State had objected to cameras in the courtroom and requested a "gag order" early in the proceedings. The Defendant opposed the State's request for a "gag order" and did not object to cameras in the courtroom.

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Finally, to the extent any error was made, this Court's instruction to the jury cured any error. *State v. Scott,* 24 Ariz. App. 203, 206, 537 P.2d 40, 43 (App. 1975) ("[T]rial court's timely corrective measures were sufficient to prevent the prosecutor's remarks from influencing the jury.")).

Incorrect Statements of Law

The State is unable to find the misstatements referenced in Defendant's Motion for Mistrial in the transcript of the rebuttal argument. What the State is able to find is proper argument including reading from the jury instructions the elements of both manslaughter and negligent homicide, and the definition of what a "gross deviation from the standard of conduct that a reasonable person would observe in the situation." *See Exhibit S, Trial Transcript at 89-92.* In its final statement to the jury the State made the following charge to the jury:

> We are here, Ladies and gentlemen, because Mr. Ray, because of his conduct – we are here because Mr. Ray intentionally used heat to create this altered mental status and was criminally reckless about the consequences. That is what reckless manslaughter is about. And I ask you again to find the defendant, Mr. Ray, guilty of all three counts.

Id. at 103:8-15.

"[P]rosecutors have wide latitude in presenting their closing arguments to the jury: 'excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.'" *State v. Jones,* 197 Ariz 290, 305, 4 P.3d 345, 360 (2000). This closing statement was a proper inference from the evidence and was not improper.

Violation of Rule 404 and This Court's Related Rulings.

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This Court has heard repeated arguments relating to the admissibility of the 2007 and 2008 sweat lodge ceremonies conducted by Defendant and other prior ceremonies not conducted by Defendant. This evidence was presented at trial for the purpose of establishing causation - specifically that the extreme heat and nature of Defendant's events caused the deaths of Kirby Brown, James Shore and Lizbeth Neuman, and not some pesticide or weed killer or treated wood. It was properly argued for this purpose during the State's rebuttal close.

Improper Vouching

The comments Defendant claims constituted improper vouching were in direct rebuttal to the attacks Defendant made on the State's case during his closing argument. The first statement, that Ms. Polk is a working county attorney, is not vouching in any manner. The second statement was in direct response to Mr. Li's extended comments about the State's "secret meeting." The statement was objected to during the closing and the following discussion occurred:

> MR. LI: The objection is that the county attorney is, essentially, testifying as to what she believes her purposes were, No. 1, which is not permissible. She is talking about actual facts in the case. She says, our belief was, et cetera. That's not permissible.
>
> Secondly, this was the subject of a ruling in which the Court did grant – in fact, granted sanctions. So whatever position the state actually had, this court found was incorrect and granted sanctions and also permitted the additional questioning of these various witnesses. The fact of the matter is this court explicitly found that this was not protected by the work product. So whatever arguments the state wants to make, they cannot make.
>
> MS. POLK: Your Honor, these constant interruptions are totally inappropriate. Detective Diskin testified. And what I'm going to say right now is that our belief his attorneys were not entitled to learn about this meeting was addressed in this court. And that came out in the testimony of Detective Diskin. And that this court ruled and that we moved on and that the defense attorneys got to interview the witnesses. That's all in front of the jury.
>
> MR. LI: Then we should get a jury instruction that the Court ordered that our attorneys' fees be paid –

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MS. POLK: Judge, this all came out –

MR. LI: -- the discussions that the county – the positions that the county attorney took that were improper.

THE COURT: Summaries of what Detective Diskin testified to, that's permissible. The problem is talking about a belief that's not per the evidence. You haven't testified, Ms. Polk.

MS. POLK: I'll say the position that the defense attorneys were not entitled to find out about the meeting was addressed by this court. That's what I'm trying to say. And that came out through Detective Diskin. This court addressed it, that you ordered that they got to talk to the witnesses, and that's what happened.

THE COURT: I believe that was the testimony, essentially.

Exhibit T, Trial Transcript, 6/21/11 at 70:10-72:5. It was Defendant who wanted the jury to hear that the State had instructed Dr. Lyon not to answer questions during his initial interview. It was Defendant who commented extensively regarding the "secret meeting" during his close. Based on the evidence and Defendant's closing, which the State was entitled to rebut, there was nothing improper in the State's comments to the jury.

Improper Appeals to Jurors' Prejudice.

Defendant also argues that the State's remarks that the case was "unbearably sad" and that "these three people looking to improve their lives trusted that for $10,000 Mr. Ray knew what he was doing and they trusted that for $10,000 Mr. Ray would . . . keep them safe," was an improper appeal to jurors' prejudice. First, the jury was instructed that they "must not be influenced by sympathy or prejudice." Second, the State does not agree that these statements, which were supported by the testimony at trial, were an improper appeal to the emotions of the jury.

In *State v. Jones,* 197 Ariz. 2090, 4 P.3d 345 (2000), the Arizona Supreme Court rejected the defendant's argument that the prosecutor's plea for a guilty verdict on behalf of the families

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required reversal. *Id.* at 306, 4 P.3d at 344. Although the court found the reference questionable, it concluded it did not "rise to the level of misconduct." *Id.* The Court contrasted the statement of the prosecutor asking the jury "to find him guilty on behalf of those people [the victims], and their families and the people of the State of Arizona," to a far more egregious statement in *State v. Ottman,* 144 Ariz. 5660, 562, 698 P.2d 1279, 1281 (1985), that the court found did not require reversal. In *Ottman*, the prosecutor asked the jury to:

> Think of another woman [the victim's wife] who will be waiting for your verdict too.
>
> On December 16th at about 7:30 in the evening she had everything to look forward to. She had her house here, they were retired, husband had a part-time job, her children are fine and well in New Jersey and at 9:30 she's at the hospital with her husband and he's dead. I can guarantee you that her life is totally destroyed. She had nothing to look forward to, nothing.
>
> You may think sympathy for someone else but in terms of that woman, she wants justice and that's your duty as jurors.

Jones, supra. The *Jones'* Court noted that "even in light of these emotional remarks, we found any error was cured because the trial judge admonished the jury to ignore statements invoking sympathy." *Id.* at 307, 4 P.3d at 362.

Another example of an improper appeal based on sympathy or passion is found in *State v. Bible,* 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993). In *Bible,* the prosecutor, after mentioning that the defendant deserved a fair trial, stated the following:

> Your goal is not necessarily just to give Ricky Bible a fair trial. Your goal in this case is going to be justice.
>
> And justice doesn't mean just giving Ricky Bible a fair trial. It means looking at the rights of other people, too, like [the victim], and those rights include those that are enumerated in the Declaration of Independence, life, liberty and the pursuit of happiness. And there won't be any of that for [the victim].

Id. During closing arguments "the prosecutor made a more detailed reference to the victim's rights:

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> [T]he defendant and all defendants have rights and a right to a fair trial.
>
> There has been a fair trial.
>
> But there are other rights. All of us have rights, including [the victim]. Perhaps the most succinct rights, the most succinct discussion of the sort of rights that we all, including [the victim], have, were described in the Declaration of Independence in 1776.
>
> ....
>
> [The victim's] rights were terminated on June 6 of 1988. She has no right to life. That was terminated with blows to her head. There is no liberty for a nine-year-old girl who is taken off of her bike, tied up and taken away from her family. And there certainly is no pursuit of happiness from the grave....
>
> Your duty is to protect the defendant's rights and also [the victim's] rights."

Id. The Court found these statements to be improper; however it then noted that "the preliminary and final jury instructions focused the relevant inquiry and helped ensure that Defendant received a fair trial. These instructions, coupled with the strength of the evidence against Defendant, show that Defendant was not denied a fair trial." *Id.* at 603, 858 P.2d at 1206.

"Within the wide latitude of closing argument counsel may comment on the vicious and inhuman nature of defendant's acts, but may not make arguments that appeal to the passions and fears of the jury." *State v. Henry*, 176 Ariz. 569, 582, 863 P.2d 861, 873 (1993). The State's comments relating to the victims were not improper and were not an appeal to the passions or fears of the jury.

Improper Commentary on Mr. Ray's Decision Not to Testify.

The State does not agree that the statement that "[i]n determining the credibility of witnesses, you are not to look at the rights, the religious beliefs and the spiritual beliefs of witnesses, including Mr. Ray. What you're supposed to look at in determining credibility is found on page 2 of your jury instructions under the instruction called "Credibility of Witnesses," is in any way a comment on Mr. Ray's decision not to testify. The comment was directed toward

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Defendant's attack on the credibility of the Hamiltons by focusing on their spiritual beliefs. The comment at issue was included in the following statement:

> MS. POLK: I want to talk just briefly about the testimony of the Hamiltons. On page 5 of your jury instructions you have an instruction that talks about the First Amendment. And it says that the First Amendment of the United State's Constitution guarantees every citizen freedom of speech and religion. Thus you must not be prejudiced or biased for or against Mr. Ray simply because you may or may not disagree or dislike the content of Mr. Ray's speech, religious and/or spiritual beliefs and ideas.
>
> The First Amendment applies to everyone in this country, including the Hamiltons.
>
> In determining the credibility of witnesses, you are not to look at the rights, the religious beliefs and the spiritual beliefs of witnesses, including Mr. Ray. What you're supposed to look at in determining credibility is found on page 2 of your jury instructions under the instruction called "Credibility of Witnesses.
>
> This instruction gives you a number of factors to look at in determining credibility and tells you to consider all of the evidence in light of reason, common sense and experience.

Exhibit U, Trial Transcript, 6/21/11 at 58:11-59:9. As noted above, Defendant ridiculed the Hamiltons' spiritual beliefs in his closing argument. The State's argument was a proper response to Defendant's remarks; the jury was also instructed that it could not hold it against Defendant for not testifying. The jury is presumed to follow instructions. *State v. LeBlanc,* 186 Ariz. 437, 439, 925 P.2d 441, 443 (1996).

I. Assuming, *arguendo,* error in the State's closing argument in the aggravation phase, it was clearly harmless.

Defendant claims the State made an improper argument during its aggravation phrase closing when it argued to the jury that Mr. Ray was JRI and that Mr. Ray profited from the sweat lodge ceremony. Both of these arguments were directed toward the alleged aggravating circumstance that Defendant committed the offense in the expectation of pecuniary gain. The jury

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found the State failed to prove this aggravating circumstance. While the State does not agree that such argument was error in any way, if there was any improper argument relating to this factor, there was no harm to Defendant. *See State v. Morris,* 215 Ariz. 324, 337, 160 P.3d 203, 216 (2007) ("Because the prosecutor's arguments were directed only toward establishing the 'heinous or depraved' prong of the F.6 aggravator" and the jury found each murder was committed in an especially cruel manner that was sufficient by itself to establish the F.6 aggravator, "the prosecutor's arguments were, at worst, harmless error.")).

Notwithstanding the total lack of any prejudice to Defendant, the comments and the argument were not improper. The issue of vicarious liability was addressed previously and was Defendant who raised this issue during trial. Given the cost of the Spiritual Warrior event and Defendant's undisputed motivation to make his events extreme, it was not an unreasonable inference to conclude he expected to profit.

The State has admitted that, during closing argument in the aggravation phase of trial, it played a portion of an audio clip it believed was included in audio clip Exhibit 744, which was admitted and played to the jury during the guilt phase of the trial. A comparison of the audio clip played during the Aggravation Hearing to a copy of Exhibit 744 provided by the clerk's office indicates that, while part of the clip played at the aggravation hearing was included in Exhibit 744, the clip played in the aggravation hearing contained approximately 1 minute of audio that was not included in Exhibit 744. On July 11, 2011, the State filed notice with this Court of this error. As noted in the State's notice and repeated here, the playing of the clip resulted in no prejudice to Defendant and had no impact on the guilt phase of the trial.

The unadmitted portion of the audio clip was only played during the aggravation phase of the trial. During trial on the guilt phase, Exhibit 744 was played from the actual exhibit which had

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been admitted during the testimony of Jennifer Haley. As previously noted in the State's Notice regarding Exhibit 734 and the State's Opening Statements, all of the audio clips played in the State's Opening Statement were admitted as Exhibit 734. Accordingly, the State's error in the Aggravation Hearing had no impact on the guilt phase.

The State played the audio clip in arguing the aggravating circumstance of pecuniary gain. Because the jury found the State failed to prove the aggravating circumstance of Pecuniary Gain, Defendant was not prejudiced by the playing of the unadmitted portion of the audio clip at the Aggravation Hearing. Specifically, the clip was played to emphasize that Defendant had told the participants they had made an "investment" to attend Spiritual Warrior. There was other ample evidence of this fact admitted at trial and in multiple forms:

- Similar words by Defendant are contained in Exhibit 745, admitted at trial and also played for the jury in the State's Closing Argument during the Aggravation Hearing. Specifically, the jury heard in Exhibit 745 that Defendant reminded the participants on Sunday that they had invested a lot of time and money to be there, and they should not waste time sleeping.
- Testimony of the participants established the amount of the investment they had made to attend Spiritual Warrior 2009.
- Exhibit 138, the Spiritual Warrior brochure, indicates the "investment" to attend Spiritual Warrior was $9,695.
- The client files of Kirby Brown and James Shore, that were admitted, indicates the amount they paid to attend.

The playing of the one minute of unadmitted audio constitutes harmless error. The jury found the State had failed to prove the aggravating circumstance of pecuniary gain, and found

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only the specifically enumerated aggravating circumstance of emotional harm to the victims' families. Clearly, the clip had no effect on the determination of this aggravating circumstance which was essentially conceded by Defendant. The only additional aggravating circumstance found by the jury was that Defendant was in a unique position of trust with victim Lizbeth Neuman. The unadmitted portion contained on the clip did not address the position of trust, had no impact on the guilt phase of trial, and had no impact on the determination of this aggravating circumstance.

J. Any mistakes made by the State do not merit a new trial.

As noted in the lengthy analysis above, the State has made a few mistakes over the course of this protracted court proceeding. Upon learning of each mistake, the State timely and in a forthright manner brought the matter to the attention of this Court and counsel.

The State's failure to disclose the Haddow report was found by this Court to be a violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). This disclosure violation was addressed by this Court during trial and appropriate sanctions imposed. Defendant used the disclosure violation during trial to question witnesses and to inform the jury, without this Court's permission, that the State had been sanctioned and that the delay in the trial was the result of the State's conduct.

Prior to trial, this Court found that the State was required to disclose the information relating to the pre-indictment meeting of December 14, 2009. This information was timely provided to Defendant months before trial and was used by Defendant in the questioning of witnesses and in closing arguments. Because Defendant had this information and made use of it during trial, there is no support for any claim that the disclosure dispute affected the outcome or the fairness of the trial.

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"Misconduct alone will not mandate that the defendant be awarded a new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Hansen,* 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) (*citing State v. Hallman,* 137 Ariz. 31, 37, 668 P.2d 239, 248-249 (1978). The State did not engage in improper closing arguments. However, to the extent this Court finds error, any error was properly addressed through instructions to the jury. "In many cases handed down by our Supreme Court, the sustaining of objections and the giving of cautionary instructions have been accorded significant weight in determining whether a prosecutor's improper remarks probably influenced the jury." *State v. Scott,* 24 Ariz.App. 203, 206, 537 P.2d 40, 43 (App. 1975).

The State agrees it committed error in its aggravation hearing closing when it played approximately one minute of an audio clip that was not included on admitted Exhibit 744, played and admitted in the guilt phase of trial. The one minute of unadmitted audio was played in support of the alleged aggravating circumstance of pecuniary gain which the jury found the State failed to prove. Accordingly, this error must be found to be harmless.

The comment to Rule 24.1 (c), states that the "harmless error" rule is applicable to all of the grounds for a new trial, including misconduct of the prosecutor. There is no evidence that Defendant was denied a fair trial by the conduct of the prosecutor and his motion for new trial should be denied.

Conclusion

"To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes,* 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998) (*quoting Donnelly v. DeChistoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "Reversal

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on the basis of prosecutorial misconduct requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial. To determine whether the prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct." *State v. Roque, supra,* 213 Ariz. 193, 228, 141 P.3d 368, 403 (2006). It is undisputed that the trial in this matter was long and hotly contested. Given the length and the nature of the trial, as well as the curative instructions given by this Court, any errors by the State must be found harmless. As the Court of Appeals noted in *State v. Schneider*, 148 Ariz. 441, 715 P.2d 297, (App. 1985):

> We note that appellant complains of about ten instances of misconduct which occurred over a very lengthy and hotly contested trial. As to each incident, the trial court either admonished the prosecutor in front of the jury or advised the jury to disregard the prosecutor's remarks. In none of the instances did the prosecutor argue his personal belief of the defendant's guilt, nor did he call matters to the attention of the jury which they would not be justified in considering in reaching their verdict. It is clearly improper for a prosecutor to thank a court for favorable rulings in response to his objections. It is also improper for a prosecutor to improperly argue the burden of proof. However, these matters were cured by the court's instructions to the jury to disregard the remarks of the prosecutor. Given the length of the trial, and the court's curative instructions, we conclude that appellant was not prejudiced by the instances of prosecutorial misconduct.

Id. at 447, 715 P.2d at 303.

The record does not support, nor is there any evidence in this case, that the State engaged in intentional misconduct "with an improper purpose or indifference to a significant resulting danger of mistrial or reversal." *State v. Lamar,* 205 Ariz. 431, 440, 72 P.3d 831, 840 (2003). Defendant's motion for new trial should be denied.

RESPECTFULLY submitted this 21st day of July, 2011.

By Sheila S Polk

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-EIGHT

JUNE 17, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

questions?

Answer: Correct.

Question: And a second interview was ordered in order for us to ask you those questions?

Answer: Correct.

Question: And the questions I asked or tried to ask then are the questions I'm asking you right now in front of this jury; correct?

Answer: Correct.

Question: About who was there, what was discussed?

Answer: Correct.

So this is a state employee, the state's own witness. In 11 years as a medical examiner he's not been told not to answer questions about his investigation. He's not been told to not answer questions that are the same questions that are being presented to you, ladies and gentlemen, the jury. Who was there? What happened? What was your investigation? You heard that testimony.

In his 11 years he's never been instructed by a prosecutor to keep something secret, to not answer.

I'm going to tell you something. We don't have secret meetings in the United States of

America when this is involved. Maybe if you're in charge of SEAL Team 6 and you're going to go capture or kill a terrorist, that's a good idea for a secret meeting. Okay?

But if we're talking about the criminal justice system, if we're talking about a man's rights and whether he should be charged, whether a man should be charged with a criminal offense, and we're talking about the evidence. That's not a secret meeting. You answer. That's what that book requires. You're the government.

You're going to charge somebody with something, you better answer, and you better explain everything. Because you don't have secrets in America about this. You don't have secret trials or secret meetings. You don't instruct state witnesses not to answer the first time in their 11 years. They can say whatever they want. They can say whatever they want.

You heard a witness on the stand, and you will remember the facts are what you consider, not the arguments. You don't even have to listen to me. Listen to what Dr. Lyon said. I've been doing this 11 years. And I've never been asked by a prosecutor not to answer questions about my

Exhibit B
Partial Transcript, 4/29/11, 59:21 – 60:4

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	)	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-NINE

APRIL 29, 2011

Camp Verde, Arizona

(Partial transcript.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

stated. For testing that was some 17 months afterward.

There hasn't been testimony that the blood would not be available or not have been reliable for testing earlier in the proceedings after the indictment, for example. So that evidence is not in.

Mr. Li mentioned yesterday, and he has apparently an opinion that evidence of chemicals in
09:47:17AM the blood disappears after three days. And I've heard him mention that to the Court yesterday. I don't know of any testimony that supports that position. I know they do have an expert, Dr. Paul. Perhaps Dr. Paul will lay that. He didn't mention that in his interview.

And if there is that evidence, and that would be something the jury, in making this inference, would be entitled to consider. At this point there's been no evidence that -- that this
09:47:40AM disappears from the blood within three days.

MR. LI: I was simply pointing out a fact that I've become aware of by doing research. And we have an article that says organophosphates dissipates quite quickly in the blood.

The only point -- that was only -- the

only point in making that is we didn't have a chance to test the blood. Mr. Ray was indicted four months -- four months after the -- the folks passed away.

And I think the Court is also correct that, yes, there are pieces of evidence that the state did collect. We're -- we're looking at them right here. But there are many pieces of evidence the state chose not to collect. And we can't test what doesn't exist. So that's the problem there.

09:48:19AM

But more importantly, Your Honor, I think Mr. Hughes is perhaps unintentionally blurring the difference between whether or not the defense could have, should have, would have, tested various objects to find some various results. And we've kind of -- we've pointed out all the deficiencies in that argument.

Blurring the distinction between that and whether or not the state can suggest to this jury that the defense has an obligation to provide information to the state to fill in gaps, to tell the state what our defense theory is, to tell Detective Diskin, hey. You should have looked at this. That's -- that's the distinction. And that's what needs to be cured. Because that

09:48:51AM

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FORTY-TWO

MAY 6, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

10:36:53AM Q. Now, when you talked to Detective Diskin
10:36:55AM or anyone from the state, you did advise them that
10:36:59AM to test something now with the passage of time was
10:37:04AM going to be like a shot in the dark; correct?
10:37:07AM A. I'm not -- I don't recall my exact
10:37:10AM phrasing, but that sounds reasonable.
10:37:15AM Q. I don't want to put words in your mouth,
10:37:19AM Doctor. I'm going to show you your transcript of
10:37:24AM our conversation on April 19. And I'll ask you to
10:37:34AM look at page 8, line 17 to 20.
10:37:37AM And this is Exhibit 997, Mr. Hughes.
10:37:49AM Just read it to yourself, please.
10:38:03AM A. Okay.
10:38:04AM Q. So after looking at that, you did tell
10:38:08AM Detective Diskin when he made the request to test
10:38:10AM at this date, given the passage of time, that it
10:38:13AM would be something like a shot in the dark;
10:38:13AM correct?
10:38:19AM A. If I could just read the transcript here.
10:38:22AM Q. Can you give me one moment to get on the
10:38:25AM same page?
10:38:26AM A. Sure.
10:38:26AM THE COURT: Ms. Do, we are going to take our
10:38:26AM morning recess at this time.
10:38:30AM Ladies and gentlemen, remember the

admonition. Please be reassembled at five till, about 15 minutes.

Dr. Mosley, you're excused at this time.

(Recess.)

THE COURT: The record will show the presence of Mr. Ray, the attorneys, the jury. Dr. Mosley is on the witness stand.

Ms. Do, you may continue.

MS. DO: Thank you, Your Honor.

Q. Dr. Mosley, thank you so much for your patience.

Before we took the break, I was asking you questions about the conversation that you had with Detective Diskin after he requested in either February or March of 2011, this year, that Ms. Neuman's blood be tested for organophosphates. So let's pick it up from there.

You have had a chance at the break to review the transcript of our conversation on April 19, 2011?

A. I have.

Q. And it is true that you told Detective Diskin at the time he made the request -- you told him that, given the passage of time, it would be something like a shot in the dark;

correct?

A. That is, essentially, what I was trying to communicate.

Q. And what you were trying to communicate to Detective Diskin was, given the passage of time and also the information confirmed in the letter by Mr. Hughes in Exhibit 1001, that the reliability of the test is also affected by the way the sample is preserved; correct?

A. Correct.

Q. So if it's a frozen sample, that's going to create problems in terms of testing; correct?

A. Correct.

Q. And in this case, Ms. Neuman's sample was frozen; correct?

A. Correct.

Q. And, to your knowledge, so was Mr. Brown's and Ms. Shore's; correct?

A. I don't know about their samples.

Q. That's fine. But based upon the letter that was emailed to you by Penny Kramer, March 3rd, it does seem to indicate that that was the problem with Mr. Shore and Ms. Brown; correct?

Do you want to see the letter again?

A. Yes.

Q. Handing you Exhibit 1001.

Your Honor, I move for the admission of 1001.

MR. HUGHES: No objection.

THE COURT: 1001 is admitted.

(Exhibit 1001 admitted.)

THE WITNESS: Well, it doesn't specifically say that the samples were frozen or refrigerated, just that -- all I assumed from that sentence is that if they were, it could affect the results.

Q. BY MS. DO: Okay. Are samples taken at autopsy typically frozen?

A. Eventually.

Q. All right. We'll clear that up. But obviously it's not something that you would know about?

A. Okay.

Q. With regards to Mr. Brown and Ms. Shore; correct?

A. Correct.

Q. Now, you also told -- what you were trying to tell Detective Diskin was that, given the passage of time and the manner in which Ms. Neuman's sample was reserved, that is frozen, that it would be foolish to derive any information

11:07:04AM a possibility; correct?
11:07:05AM A. Correct.
11:07:05AM Q. And if someone had figured it out within
11:07:08AM those first two days, those 48 hours, somebody
11:07:12AM could have called the hospital and said, keep all
11:07:14AM the admission blood samples before the seven days
11:07:17AM expire; correct?
11:07:19AM A. Correct.
11:07:19AM Q. And if that had been done, you could have
11:07:22AM tested the blood samples for the actual compound;
11:07:22AM correct?
11:07:27AM A. As I understand it, yes. That's correct.
11:07:29AM Q. Which is what you did with NMS Labs in
11:07:33AM February or March of this year; correct?
11:07:34AM A. Correct.
11:07:35AM Q. You could have also run another test
11:07:38AM looking at the blood samples for what we talked
11:07:41AM about, the cholinesterase activity; correct?
11:07:45AM A. Correct.
11:07:45AM Q. And that's, basically, a marker, a
11:07:46AM biological marker, that there were
11:07:49AM organophosphates; correct?
11:07:50AM A. Right. If the cholinesterase in the
11:07:54AM blood is poison, then there should be less
11:07:57AM cholinesterase activity in the sample because it's

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-EIGHT

JUNE 17, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

employee. We had to go get the DPS employee and put her out here so you could actually see what the science is. Why is that?

Why does Mr. Ray, who doesn't work for the State of Arizona, doesn't have the resources -- why is it that Mr. Ray has got to get the state employee in here to testify about what she found in the labs? If it's -- why?

And I just want to point something out. The state in trying to answer that question, you will recall -- I think you will recall, Ms. Sy, you had vacation plans in Hawaii, didn't you? And you had vacation plans, and it kind of conflicted. And that's why we didn't hear from you. This is vacation. So that's why. The state was just being nice.

How many of you -- look at yourselves. You've sacrificed four months here. I know there are some of you who are sacrificing right now who have plans, really important plans, and are sacrificing to do your duty. Okay? To do your duty. You're sacrificing.

But the state -- you know -- they don't need to call this employee who is going to tell you all this stuff because she had vacation plans kind

of got in the way. Forget it. While you're sacrificing here four months.

Is that how you want your government to work? Or is the answer actually that what Dawn Sy had to say isn't very helpful to the case for the state? Is it possible that the state didn't call her because Dawn Sy would give you that real possibility that Mr. Ray didn't kill these folks? How about that? How about it wasn't a vacation plan? How about this looks bad?

So Ms. Sy's report is finished. It gets sent. It actually gets sent sometime in the next couple weeks. The detective doesn't even look at it. Nobody looks at the objective evidence, the science, the tapes, the 2-ethyl-1-hexanol. Nobody talks to the criminalist.

You know why? I'll tell you why. Because, look. There's a camera over there. There is a big media event. We just arrested somebody for the sweat lodge killings. And we got a camera. We've had that camera in the courtroom every single day.

And when you guys first started, you will remember there were trucks everywhere as you walked into the courtroom. Trucks everywhere. We got a

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY TWENTY-TWO

MARCH 25, 2011

Camp Verde, Arizona

(Partial transcript.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

Okay. I have a bench conference going.

And, Ms. Polk, you were addressing the Court when we got the message that the jury needed a break.

MS. POLK: Yes, Your Honor. Your Honor, specifically the state is seeking guidance about a line of questioning that I would like to pursue. And I don't want to pursue it in front of the jury if the Court is going to order otherwise. But I

10:09:57AM believe that relevant evidence in this case needs to come in, and specifically that relevant evidence is that there were problems experienced by participants at past sweat lodges run by Mr. Ray.

And this trial has become a, I hate to use the word, "game." But we constantly have to skirt the fact that there is relevant evidence out there that is relevant to what witnesses do in 2009, specifically because they are not told by Mr. Ray that there have been problems in the past.

10:10:31AM With this witness in particular, Mr. Kelly has clearly made that evidence relevant by asking this witness, didn't Mr. Ray give you a good description in that presweat lodge briefing of what was to follow?

And what we know is that Mr. Ray did not

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-FIVE

APRIL 22, 2011

Camp Verde, Arizona

(Partial transcript.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

That itself opens up a minitrial, the potential for people discussing hearsay.

I understand that Ms. Hamilton had direct observation. There was testimony to that effect. But that was a remote incident. It was four years before. I've mentioned the problem of causation that has now been raised, potential problems. So that -- that's not going to be discussed.

Again, that's something if -- that may be
08:35:50AM discussed or there may be testimony about if the door is open on cross-examination. I just -- just wanted to say that. I don't want any misunderstanding about that.

I've really said this, but I want to emphasize that there's been hours -- I think in the defense pleading they talked about days, but hours of testimony regarding prior sweat lodges in '07 and '08, a great deal of testimony about comparisons. It really is cumulative. And I think
08:36:22AM in looking at Rule 611, it's time to really look at Rule 611 considerations.

Counsel, those are the rulings.

Anything else, Mr. Hughes?

MR. HUGHES: Your Honor, just for clarification. I'll be doing the examination of

Ms. Hamilton. I want to make sure I don't run afoul of the Court's rulings.

I understand obviously I can't ask her about any problems she may have observed any year other than 2009. I had hoped to ask her a little bit just about the general history of when did Mr. Ray start bringing his events to Angel Valley, how many people did he bring each year, questions like that.

08:37:01AM But I will steer away from, not ask any questions about whether there were any problems in those years, anything along those lines.

I just want to make sure I can ask her some questions about the general history of -- of her relationship with Mr. Ray and -- and with the events being held on the property.

THE COURT: Ms. Do, are you -- who's going to be cross-examining?

MR. LI: I will. Our position is provided

08:37:24AM that -- that the witness is instructed by counsel not to blurt out all the various rational -- rationalizations for why she did one thing versus another. Because these witnesses, as the Court has seen, do have a tendency to just say whatever, want to get their particular message out there.

And if it's simply did Mr. Ray contract with you in 2003, 2004, 2005, 2006, 2007, 2008 and hold the Spiritual Warrior seminar there, that's fine. But she -- she has a tendency to say things like, well -- you know -- in 2005 we thought there was a problem so we weren't sure whether we wanted to do it in 2006.

And I just want to make sure that we don't -- you know -- inadvertently run into the

08:38:05AM ruling that the Court has just made.

THE COURT: Mr. Li, you made that point last week, and the state acknowledged that their -- with any witness, both sides need to be aware of any -- with any witness. And there was something that came up yesterday.

MR. LI: And that's all I -- that's the reason why --

THE COURT: And that's the kind of thing you're talking about.

08:38:19AM Mr. Hughes.

MR. HUGHES: Your Honor, in anticipation of Mrs. Hamilton might have been on the stand yesterday, I'd spoken to her the night before and thought this might be the Court's ruling. So I did read her the riot act, so to speak, then. And I

will do that again before she gets on the stand, that I will tell her no way, shape, or form do any of my questions ask her about problems or issues that she's had with Mr. Ray in prior years, and that, quite honestly, the Court's ruled that that's not relevant from her and she's not to talk about that.

THE COURT: In terms of general background, it's admissible. My view -- I've said this and

08:39:01AM I -- is I want the jury to have relevant evidence and to be able to -- to decide factual issues. And they have to have a framework.

Anything else, Counsel?

Ms. Do.

MS. DO: Yes, Your Honor. I just wanted to get a little bit more guidance since I'm cross-examining Mr. Hamilton.

The Court has heard under direct examination a lot of testimony from Mr. Hamilton

08:39:28AM regarding the exhibits of the tarps and the materials. It was my position yesterday, and the Court stated I could handle this on cross, that Mr. -- I'm sorry -- Mr. Hamilton lacks personal knowledge and foundation for a lot of the testimony he gave yesterday.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FORTY-ONE

MAY 5, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

09:07:58AM So I want to make sure that the record is clear. We believe that it's improper. We move for a mistrial. And we're not waiving that given the second witness in the afternoon.

THE COURT: Ms. Polk.

MS. POLK: Your Honor, the -- when Mr. Kelly cross-examined Detective Diskin, he had stated to Detective Diskin that you never told Ms. Do in the interview that occurred in June of 2010 about carbon dioxide, did you?

And Detective Diskin had responded, yes. I did.

And then Mr. Kelly had said, well, we can look at a transcript, can't we, and then never went back to it.

My question on redirect was picking up on that line, did you tell Ms. Do in the interview about carbon dioxide, and what did you tell her? But it was simply following up on a question by Mr. Kelly in his cross-examination.

THE COURT: The motion for mistrial is denied.

MR. KELLY: Judge, that's the only issue that I had this morning. Thank you.

THE COURT: Ms. Polk, Mr. Hughes, anything?

MR. HUGHES: No other issues, Your Honor.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FORTY-ONE

MAY 5, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

But I don't know why the state brought up the Haddow report. I know that the state has had their own issues with the defense, essentially, testifying on cross-examination by making a statement and then asking a witness sometimes without knowledge, do you agree that this? Do you know that this? And that was that kind of a question from the other side but directly relating to a Brady situation. They don't really equate.

At this point the motion for mistrial is just, essentially, under advisement. I'm going to continue today.

The issue of CO2. It has been in the case. It was in the Grand Jury transcript to some level. It's been there. The state absolutely must avoid any further suggestion there is some report out there that sanctions some other inculpatory theory that hinges on CO2.

But the motion is just, essentially, understand advisement right now.

Mr. Kelly, is this an extra copy?

MR. KELLY: That was my copy, Judge. But perhaps we should mark it for the record. And I will do that the next available moment.

THE COURT: That's why I'm asking. There will

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff,	)	
vs.	)	Case No. V1300CR201080049
JAMES ARTHUR RAY, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-EIGHT

APRIL 28, 2011

Camp Verde, Arizona

(Partial transcript.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

everybody, whoever it might be, wasn't telling him something. I have a concern about that.

So at this point, in terms of explaining the investigation, that's fine. But in terms of implicating or implying that the defense has some obligation, questions that do that, I will look at the law before I say anything further on that.

I would also like to see law on the idea of contemporaneous instruction. I know it's provided for in 105 limiting instructions. It's there. But to in the middle of the trial make various instructions, it's not something that you see often. There has been Brady issue here. It's an unusual posture anyway.

02:49:23PM

We're well past 90 minutes. We need to take a break and resume at 3:00.

(Recess.)

(Proceedings continued in the presence of jury.)

03:20:20PM

(Sidebar conference.)

MS. POLK: Your Honor, I wanted to check. In light of the Court's rulings, I had intended at this point to establish that no script pertaining to the briefing prior to entering the sweat lodge was found in the room.

w/o

V1300CR201080049

Ladies and Gentlemen,

A ~~criminal~~ defendant is always free to challenge the sufficiency of the evidence with respect to an element or issue upon which the State bears the burden of proof, even without any advance notice of intent to do so. A defendant need not provide the prosecutor or the court with a preview of his case or his arguments.

You heard testimony this morning and yesterday regarding when and how the Detective learned about information related to possible organophosphate poisoning. In considering this information, you must remember that the prosecution has the burden to prove all elements of the charged crimes beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The burden of proof never shifts to Mr. Ray, the defendant. Mr. Ray is not required to produce any evidence at all.

Exhibit K
Partial Transcript, 6/1/11 7:3-8; 23:7-9

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	)	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FORTY-EIGHT

JUNE 1, 2011

Camp Verde, Arizona

(Partial transcript.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

08:51:25AM Obviously it's in the state's interest as
08:51:27AM well as the defendant's interest that this witness
08:51:29AM tell the truth on the stand. And the state has not
08:51:32AM offered nor would we ever offer immunity for
08:51:37AM perjury on the stand. Nor does the statute allow
08:51:40AM the Court to grant such immunity. And that's
08:51:42AM consistent with what Mr. Launders had advised his
08:51:45AM client.

08:51:47AM Just briefly responding to the request
08:51:49AM from the defense that the Court review the Launders
08:51:54AM statement in camera to determine whether Mr. Rock's
08:51:58AM testimony rests on perjury or contains Brady
08:52:03AM information. The information -- the Court
08:52:06AM indicated the Court has not looked at it and that
08:52:08AM you don't intend to look at it.

08:52:10AM I haven't had a chance to review the
08:52:12AM canons, but it's not clear to me that the Court
08:52:14AM would have authority to look at the information ex
08:52:17AM parte in any event.

08:52:19AM And, secondly, should the Court look at
08:52:21AM it, it's not clear what you would do with the
08:52:24AM information. It is attorney-client privileged.
08:52:27AM And I'll address that in a minute. But it also --
08:52:31AM just for the sake of argument, even if the Court
08:52:34AM determined that it was exculpatory information,

most directly to this very difficult situation.

Mr. Kelly, I can assure you I'm not going to put time concern over issues of -- that are significant. I would not do that.

Given Mr. Launders's statement here that -- I have to go with what Mr. Launders said. It did not relate to those types of concerns and a concern that there is impending perjury, a crime of some sort.

With regard to the Brady issue coming up with the witness, not something the state knows, that's just something that I'm not going to deal with at this time. You've certainly made a thorough record on that.

I do intend to proceed with Mr. Rock. Mr. Li mentioned the content of order for use immunity. This is typically the type of order I see.

Mr. Kelly or Mr. Li, if somebody would address that, the proposed order by the state.

MR. KELLY: Judge, before we go to that point, then, is it your ruling that you're not going to look at the sealed information?

THE COURT: I am not going to look at the sealed information.

Exhibit L
Partial Transcript, 6/15/11 52:17-53:20; 59:7-10

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	)	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SIX

JUNE 15, 2011

Camp Verde, Arizona

(Partial transcript -- commencement of Ms. Polk's closing arguments.)

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

that they need -- the jurors need to be instructed.

Right now the burden has been shifted, one. Two, there -- there -- evidence has been used for improper purposes or for purposes that were not permitted by the Court. And three, there was vouching. Any of those grounds would -- would merit mistrial.

Four, there was a discussion about the vicarious liability, which is exactly why we were asking for that instruction. The Griffin era or -- Your Honor, and so as a consequence, it's not simply enough to just -- you know -- let the prosecutor continue on and then we'll figure it out. I mean, there's a jury in the box that has been told by the prosecutor a number of things which are improper.

MS. POLK: And, Your Honor, again, I am -- I am arguing the evidence that was admitted at trial. The defense requested, and the Court gave over the State's objection, the Willits instruction on lost, destroyed, or unpreserved evidence. And that instruction to the jury says, if you find that the state has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in the case, you should weigh the

explanation, if any, given for the loss or unavailability of the evidence.

That instruction puts the state in a position of explaining what I explained to the jury. All of that information about when it was that the state learned about this defense came out during trial testimony. This -- this instruction specifically says to the jury that they can weigh the explanation, if any, given for the loss. And that is what I was arguing to them.

THE COURT: Part of the explanation is is because the defense didn't tell us in time or something, that's -- that's burden shifting. That's burden shifting.

What I'd suggest I would do at this point is instruct that the state always has the burden of proof and that instructions -- special instructions I've given throughout the trial in the use of evidence have to be -- have to control the consideration of the evidence.

And rather than go in and make something worse by just some verbal attempt, if there is a written instruction that can be presented, I -- I would like that. That can be done.

But these are -- these are concerns, as

04:36:53PM speaker really engaged in any of the actions she
04:36:55PM describes. For that reason, you may not consider
04:36:58PM the statement as evidence of what the speaker
04:37:01PM actually did or believed. The only purpose you may
04:37:03PM consider the evidence for is for what effect, if
04:37:06PM any, the statement may have had on a listener.
04:37:10PM Ms. Polk, you may continue.
04:37:12PM MS. POLK: Thank you, Your Honor.
04:37:33PM I want to talk to you a little bit about
04:37:35PM this audio that you heard in its entirety during
04:37:38PM the course of this trial. On the night of
04:37:40PM October 8th, 2009, what is the crucial piece of
04:37:46PM evidence that the first responders who were
04:37:48PM scrambling to understand what had happened -- what
04:37:52PM didn't they have? And that night what is the
04:37:55PM crucial piece of evidence that the ER doctors who
04:37:58PM were looking at all possible causes -- what did
04:38:02PM they not have? Over the next few days, what is the
04:38:05PM crucial piece of evidence that the doctors who were
04:38:08PM treating Liz Neuman did not have?
04:38:10PM The answer is the defendant's own words
04:38:13PM describing how he was intentionally subjecting
04:38:18PM participants to extreme heat to achieve this
04:38:22PM altered mental state, telling them to ignore their
04:38:26PM body's signs and symptoms of distress, and the

Exhibit M
Partial Transcript, 6/16/11 28:11-29:16; 36:3-13

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	)	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SEVEN

JUNE 16, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

indictment.

So at that point are we supposed to go to the government -- it was after -- Ms. Do tells me it was after we interviewed the ME, the medical examiner. Sorry. And so at that point when we are barreling towards trial -- the Court will recall that we had a trial date, I believe, of -- in August or September. We're barreling towards trial. Is that the point we're supposed to tell the prosecution about their own evidence?

MS. POLK: Your Honor, I'd like to respond to this because this is fair comment on the evidence. Everything I've said is based on the testimony of witnesses in this trial.

When I said -- when I explained to the jury why we didn't test for organophosphates, my explanation was that that is something that you have to test for within hours or days, and that was based on the testimony of Dr. Paul.

That was not suggesting that the defense in that first week was supposed to come in and test the evidence. That was the explanation for why the state didn't test for organophosphates and because we learned through the course of the trial that any testing -- well, first of all, we didn't test

because we didn't know about it.

But secondly, organophosphates, coincidentally, just turned out to be something that if you don't test for immediately, then your tests are not going to be relevant anyway. That was my questioning.

Attorneys in closing argument, Your Honor, are entitled to argue the evidence and comment on reasonable inferences. That's what I'm doing. I can strongly comment on what the evidence is and what it suggests. That doesn't become burden shifting. That doesn't become improper comment. My comments are have been appropriate. I have -- everything I have said is based on testimony of the witnesses.

Now, if Mr. Li wants to get up and argue to the jury other inferences from the evidence, he is entitled to do that. But he is not entitled to shut me down and keep me from arguing reasonable inferences based on the evidence and arguing the jury instructions.

Again, over the state's objection, there is a Willits instruction out there. And the state is entitled to argue under the Willits instruction what our explanation is for not testing certain

10:17:50AM 1 that you find do apply to the case. And you will
10:17:55AM 2 get written instructions.
10:17:56AM 3 But occasionally I have given some verbal
10:17:59AM 4 instructions that you are to consider as well. And
10:18:03AM 5 I'm going to give one that I -- it's really one
10:18:07AM 6 that I did verbally yesterday. But I'm going to
10:18:12AM 7 state that a defendant is always free to challenge
10:18:15AM 8 the sufficiency of the evidence with respect to an
10:18:17AM 9 element or issue upon which the state bears the
10:18:20AM 10 burden of proof. Even without advance notice of
10:18:23AM 11 intent to do so, a defendant need not provide the
10:18:27AM 12 prosecutor or the Court with a preview of his case
10:18:29AM 13 or his arguments.
10:18:31AM 14 So with that, Ms. Polk, are you ready to
10:18:32AM 15 continue?
10:18:33AM 16 MS. POLK: I am, Your Honor. Thank you.
10:18:43AM 17 Good morning. I'm going to pick up where
10:18:45AM 18 I left off yesterday and play that clip for you
10:18:48AM 19 that I couldn't get to play. But I want to put
10:18:52AM 20 that clip, again, in context for you. Because as
10:18:55AM 21 you heard during the testimony of Dr. Paul, the
10:18:59AM 22 defense's doctor, he never heard what's on that
10:19:04AM 23 audio. He never heard the words of the defendant
10:19:07AM 24 when the defendant describes how he intentionally
10:19:12AM 25 is bringing his participants to this extreme mental

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SIX

JUNE 15, 2011

Camp Verde, Arizona

(Partial transcript -- commencement of Ms. Polk's closing arguments.)

REPORTED BY
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AZ CR NO. 50619
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THE COURT: Well, I want Ms. Polk to be able to address anything that you believe.

MR. LI: Well, then I'm going to add one more, which is there is a continual refrain, the defendant wants you to believe "X." We are walking right up to what in -- in California is called "Griffen era." I'm not certain what the case is in Arizona. But it is the Griffen era. We're walking right up to it. And this also would be grounds for mistrial.

THE COURT: Ms. Polk.

MS. POLK: Your Honor, if there are specific areas you'd like me to address now, I will. What I would request is that I be allowed to finish. There have been some inadvertent "we know that." I don't intend to say that. But if there's areas of concern you'd like me to address, I can.

But what I would request is that I be allowed to finish. They've made the record and that I could address the concerns at a later date. We're going to eat up --

THE COURT: All right. I note these concerns and -- and if you think there's not a problem, then I want to hear your -- your side of it. And if you think that was the only possible issue had to do

Exhibit 0
Partial Transcript, 6/16/11 108:13-109:2; 110:19-23

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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TRIAL DAY FIFTY-SEVEN

JUNE 16, 2011

Camp Verde, Arizona

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AZ CR NO. 50619
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it was either reckless or intentional. We did move for this case to be dismissed with prejudice. So -- and the Court ruled on that.

THE COURT: Well, I asked you, are you moving for mistrial because it took you a while to get to that frame in the motion that you decided to do that? So it didn't come up initially as a mistrial motion. You indicated you did not want to come up -- during the closing, you were going to have the normal courtesies that are extended in the usual trial setting, and you proceeded in that fashion.

And that's why it's so important to have the context. When I think back with Ms. Polk's references to "we know," there could be a vouching, like where we know. I mean -- you know -- I looked at it as a comment in almost as saying, well, the evidence as shown here in court. That's the way I took it.

MR. LI: No, Your Honor.

THE COURT: If I missed that -- I mean, that was the impression I had because I know what vouching is. And to suggest that we have inside information, we wish we could tell you about it, and we really checked this out and we know, that's

12:23:44PM vouching. I did not take those comments in that
12:23:47PM vein.
12:23:47PM MR. LI: Well, there is two kinds of vouching,
12:23:48PM Your Honor, for the record. One is the latter that
12:23:51PM the Court has just mentioned, that we have special
12:23:54PM information.
12:23:54PM But, Your Honor, it's not that. It's
12:23:55PM just simply putting the weight of the government
12:23:58PM behind any statement, any witness. And my
12:24:01PM recollection is that this was in the context of
12:24:04PM Ms. Brown's tape, which was another violation of
12:24:08PM this Court's rulings.
12:24:09PM We know what Ms. Brown was thinking.
12:24:16PM Yes, we knew what the defendant knew and what
12:24:19PM Ms. Brown was thinking. And this is all in the
12:24:21PM context of explaining of the tape relating to Kirby
12:24:28PM Brown, which was played for an improper purpose
12:24:31PM which the Court had to instruct this jury.
12:24:33PM There is nothing I've said, Your Honor,
12:24:35PM that's inaccurate. It is a fact that the
12:24:39PM defense -- that the defense was put in a position
12:24:40PM of having to object to this Court, ask for a
12:24:42PM limiting instruction -- not a limiting instruction,
12:24:45PM an instruction on substantive areas of law to
12:24:48PM correct the error that would, in fact, cause a

mistrial.

And, Your Honor -- you know -- I don't want to interrupt the prosecutor in the middle of her arguments. And I appreciated the courtesy that she extended me just now to wait for this break. But the reality is that those are violations.

MS. POLK: Your Honor, the reality is that there has been flagrant misconduct, and there needs to be an instruction to let this jury know that what Mr. Li has suggested is simply not true.

THE COURT: I found it appropriate to provide instructions previously to make sure there might not be a misunderstanding that there could be an inference drawn because of the nature of what was presented, and I've indicated those instances. Some of them were quite close, to me, in crossing the line.

And you brought up first, Mr. Li, the mention of "we know." And, again, that's the way I took it. I'd have to see the -- the way I described it is the way I took it. It was not some -- putting some kind of authority behind it other than a presentation of the evidence. And that's just the way it appeared to me.

But to actually say that the Court had to

Exhibit P
Partial Transcript, 6/15/11 14:19-15:9; 50:11-51:1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	)	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SIX

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(Partial transcript -- commencement of Ms. Polk's closing arguments.)

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You're better than that, that those words affected his ability to leave the tent and that he repeated those words to himself inside the tent, eventually passing out sometime around the fifth round.

And Sean Ronan testified that he and James Shore stood in line together before entering the tent. You recall Sean saying that one of the things that James Shore said to Sean as they lined up outside to go in was how James Shore was really looking forward to the lodge and sitting up in front because he knew we were going to be doubled up. Because he, meaning James Shore, always had a fear of doing that, so this was going to be a chance for him to break through that fear.

This is a photo of the area where Kirby Brown sat. You remember the testimony of Beverly Bunn that that is Kirby's tobacco pouch that she made.

And here's what we know about Kirby's frame of mind as she entered the sweat lodge: And we know that the defendant knew this too because this is the statement that Kirby made on Thursday after she had come off of the Vision Quest during an open-mic session shortly before entering the defendant's heat-endurance challenge.

03:07:44PM (Audio played.)

03:11:43PM MS. POLK: So determined was Kirby Brown to learn what she thought Mr. Ray had to teach that for five hours during that Samurai Game she laid there without moving. Mr. Ray knew that. He knew the influence that he had on Kirby and others because Kirby and others took the open mic and made statements like that shortly before they all went into his heat-endurance challenge.

03:12:10PM Witness after witness in this trial has testified how they trustified (sic) Mr. Ray's assurances that they could make it through all the rounds and that it was safe to ignore their body's signs of distress.

03:12:23PM Dennis Mehravar, who passed out, again, inside around the fifth round, testified he believed that Mr. Ray knew better than Dennis himself, and that Mr. Ray told him, if you don't believe in yourself, believe in me, meaning Mr. Ray. My faith will overshadow your doubts. Dennis thought that Mr. Ray knows what I can accomplish better than I know myself.

03:12:51PM At least one participant, Dawn Gordon, testified she understood the sweat lodge event could cause death but trust -- trusted that the

with an indication of possible vouching, the defendant wants you to believe, making that kind of comment, can sound very close to what somebody might be saying or not saying.

MS. POLK: And, Your Honor, I'll correct that and say -- say the defense -- again, those are not intentional efforts at vouching.

THE COURT: And the evidence being admitted for particular purposes and staying within those purposes, I noted that concern, as well.

MS. POLK: And what I'd like to do is pull up that limiting instruction. My recollection was that it was introduced for that purpose to understand Kirby's state of mind as she entered the sweat lodge.

THE COURT: I thought I heard you also indicating that the facts remembered were -- exactly how many hours were spent and the suffering and that which --

MS. POLK: Your Honor --

THE COURT: -- is against -- against 803.

MS. POLK: And excuse me for interrupting, but there was testimony from other witnesses that Kirby lay there for five hours. That didn't come from the tape. And I argued the tape for that purpose,

that that was her state of mind. But there's other witnesses who testified -- Jennifer Haley and others who testified how long it was that Kirby laid there.

THE COURT: I remember the bench conference with -- with Jennifer Haley. And there was a tendency there for her also on that to bring in hearsay. And the only thing I brought in was a sense impression type of thing about feeling a sense of accomplishment or something. That was the only thing that was supposed to come in on that. Because, once again, it's going to be another form of hearsay statement.

Anyway, I -- I think there are grounds for these and -- and direct that you acknowledge them. And you have.

MS. POLK: And I'd like to make a full record at another time, Your Honor, when I have the opportunity to fully explore. But my preference is to be able to bring the jury back in and use the time that I have left.

THE COURT: Mr. Li.

MR. LI: Your Honor, we would love for the -- the prosecutor to be able to finish her closing argument. But we think that these are errors and

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BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SIX

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defendant would keep her safe inside. It seems that the defendant wants you to believe that this is merely a corporate event that he just shows up for.

But we've produced for you the corporate filings to show you what -- who is the president of JRI? It's James Ray. Who is the secretary of JRI? It's James Ray. Who is the treasurer of JRI? It's James Ray. Who is the director of JRI? It's James Ray. And who signed this annual filing but the defendant.

Mr. Kelly drew a diagram -- let me see if I can find it -- couple of diagrams actually through witnesses, I believe, trying to suggest that somehow that Mr. Ray's way up at the top and not responsible for what happened in the sweat lodge. We recall two diagrams again putting Mr. Ray way up at the top.

There is no question that the defendant's conduct caused the deaths, and there is no question that Mr. Ray controlled every single aspect of that heat-endurance challenge. Mr. Ray chose to hold the heat event at Angel Valley. Mr. Ray controlled how many people he crammed into the tent. The defendant controlled the number of rounds. The

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-NINE

JUNE 21, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

and there out of context is not sufficient -- is not basis for him to keep interrupting.

The totality of the evidence is that Dr. Mosley stayed with his opinion that they died of heat stroke.

MR. LI: That's not the case, Your Honor. Dr. Mosley repeatedly said that after reading Dr. Paul's report, he changed his opinion, that he now believes toxins could be at work. We read it directly from the transcript. That's what he said. He said it repeatedly.

THE COURT: I think he stayed with his original --

MR. LI: Your Honor, we can show you the transcript.

THE COURT: This is argument, Mr. Li. And I reminded the jury repeatedly at this time that there has been four months of testimony. And if you have something that's just absolutely definite, that's one thing. But you clearly don't at this time. And this is argument. I've reminded the jury now three times, I think. This is the fourth time.

So, Ms. Polk, you may continue.

MR. LI: Thank you, Your Honor.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-NINE

JUNE 21, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

11:53:59AM Mr. Ray knew that people were dying. We do not.
11:54:05AM It's in your jury instructions. We do not have to
11:54:08AM prove that Mr. Ray knew people were dying. What we
11:54:11AM have to prove is that Mr. Ray was aware of and
11:54:16AM consciously disregarded a substantial and
11:54:24AM unjustifiable risk that his conduct would cause
11:54:25AM death. Awareness that your conduct will cause
11:54:27AM death is different from knowing that people are
11:54:29AM actually dying.

11:54:31AM For reckless manslaughter you must find
11:54:33AM beyond a reasonable doubt that Mr. Ray was aware of
11:54:37AM and consciously disregarded the risk that his
11:54:41AM conduct would cause death, not that he knew that
11:54:44AM people were dying.

11:54:46AM Mr. Ray told you that manslaughter is for
11:54:49AM cases where people are shooting off guns or
11:54:51AM slashing with knives. It is not the weapon that
11:54:55AM determines the degree of homicide that a person may
11:54:58AM or may not have committed. It is the culpable
11:55:02AM mental state of the person using the weapon that
11:55:04AM determines the crime. When a person as a result of
11:55:08AM another person's criminal conduct dies, there are
11:55:12AM different levels of homicide that could possibly
11:55:15AM have occurred.

11:55:16AM In reckless manslaughter, reckless

11:55:17AM manslaughter is a charge that is meant to prevent
11:55:23AM people from recklessly engaging in conduct they
11:55:27AM know can cause death, exactly what happened here.
11:55:30AM And when a person doesn't know or fails to perceive
11:55:33AM the risk that their conduct will cause death, then
11:55:38AM their failure to perceive it -- and their failure
11:55:40AM to perceive it is a gross deviation from the
11:55:43AM standard of conduct of a reasonable person, then
11:55:45AM you have the lesser offense of negligent homicide.
11:55:49AM But in both instances what we have to
11:55:51AM prove is that Mr. Ray's conduct created the risk of
11:55:55AM death, not that Mr. Ray knew that people were
11:56:00AM dying.
11:56:03AM Mr. Li argued to you that Mr. Ray could
11:56:08AM not have known that people were dying because he
11:56:10AM claims no one knew. In fact, as you have seen in
11:56:15AM this case by listening to all of the witnesses,
11:56:18AM many people did know that something was wrong and
11:56:21AM that people were in trouble.
11:56:22AM Many people did call out to Mr. Ray, the
11:56:25AM master of the lodge, as he called himself, for help
11:56:28AM and guidance. And when they called out to him for
11:56:31AM help and guidance, he told them to leave
11:56:35AM unconscious people where they were until the round
11:56:38AM was over, and he told them that participants with

11:56:42AM labored breathing, such as Liz Neuman and Kirby,
11:56:46AM were fine.
11:56:47AM That's what the crime of manslaughter is
11:56:49AM about, being aware that your conduct creates a
11:56:53AM substantial and unjustifiable risk of death, which
11:56:57AM Mr. Ray clearly was, and consciously disregarding
11:57:01AM that risk, which Mr. Ray clearly did.
11:57:05AM You have learned through all the
11:57:07AM testimony that after the fifth round Dennis
11:57:11AM Mehravar passed out. And when he awoke, he
11:57:13AM believed he was having a heart attack and screamed
11:57:15AM out, I'm dying. I'm dying. And you learned that
11:57:18AM Mr. Ray did not take heed but simply leaned out of
11:57:23AM the tent and yelled out Dennis, buddy, you're not
11:57:27AM going to die. Less than an hour later two people
11:57:32AM were dead.
11:57:36AM The state does not have to prove that
11:57:37AM Mr. Ray or anybody knew that people were dying. We
11:57:41AM do have to prove that Mr. Ray was aware of and
11:57:45AM consciously disregarded the substantial and
11:57:50AM unjustifiable risk that his conduct would cause
11:57:51AM death.
11:57:52AM Without question beyond any reasonable
11:57:56AM doubt, the state has proven that Mr. Ray was aware
11:57:59AM that people were unconscious, not breathing and in

11:58:02AM trouble and that he consciously disregarded the
11:58:05AM substantial and unjustifiable risk that his conduct
11:58:08AM would cause death.

11:58:20AM The defense has suggested to you that
11:58:22AM what occurred on October 8 during Mr. Ray's
11:58:26AM Spiritual Warrior event was merely an accident.
11:58:31AM Intentionally using heat to create an altered state
11:58:35AM and being reckless about the consequences is not an
11:58:39AM accident.

11:58:41AM In order to find the defendant guilty of
11:58:43AM manslaughter, you must find that his disregard of
11:58:47AM the risk of death created by his conduct was a
11:58:50AM gross deviation from the standard of conduct of a
11:58:53AM reasonable person in that situation.

11:58:57AM I'm going to read to you from page 6 of
11:58:59AM your instructions. The risk must be such that
11:59:07AM disregarding it was a gross deviation from the
11:59:10AM standard of conduct that a reasonable person would
11:59:13AM observe in the situation.

11:59:19AM The jury instructions tell you that
11:59:20AM conduct in civil cases is inadvertence or
11:59:24AM heedlessness and that criminal conduct is conduct
11:59:27AM which is extreme or flagrant, outrageous or heinous
11:59:33AM or grievous.

11:59:38AM Heat stroke or hyperthermia is a horrific

12:14:18PM unconscious, not breathing, need to get out,
12:14:23PM continuing to act, continuing to create more of
12:14:27PM that searing heat and more of that searing steam.
12:14:33PM That's what's wrong with this case. Mr. Ray's
12:14:37PM conduct in continuing to introduce that lethal heat
12:14:44PM with three people down and in distress in his sweat
12:14:49PM lodge.

12:14:50PM We are here, ladies and gentlemen,
12:14:52PM because Mr. Ray, because of his conduct -- we are
12:14:58PM here because Mr. Ray intentionally used heat to
12:15:02PM create this altered mental status and was
12:15:06PM criminally reckless about the consequences. That
12:15:10PM is what reckless manslaughter is about. And I ask
12:15:12PM you again to find the defendant, Mr. Ray, guilty of
12:15:16PM all three counts.

12:15:19PM Thank you.

12:15:32PM THE COURT: Thank you, Ms. Polk.

12:15:36PM Ladies and gentlemen, in just a couple
12:15:38PM minutes we'll be selecting the alternate jurors.

12:15:41PM And for those of you who will be selected
12:15:44PM as alternates, I have some very important
12:15:46PM instructions. I'll say this a couple of times.
12:15:49PM Don't go anywhere. Don't leave when -- if your
12:15:53PM name is called, you need to stay there to get the
12:15:55PM instructions. And, basically, the instructions are

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	)	Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-NINE

JUNE 21, 2011

Camp Verde, Arizona

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

11:28:22AM MR. LI: Objection, Your Honor.

11:28:28AM MS. POLK: -- of our charging meeting was addressed by this point.

11:28:35AM THE COURT: Counsel, approach, please.

11:28:35AM (Sidebar conference.)

11:28:48AM MR. LI: May I state my objection?

11:28:50AM THE COURT: You know, this is an unusual situation, Ms. Polk and Mr. Li.

11:28:57AM But, Mr. Li, go ahead and articulate.

11:29:00AM MR. LI: The objection is that the county attorney is, essentially, testifying as to what she believes her purposes were, No. 1, which is not permissible. She is talking about actual facts in the case. She says, our belief was, et cetera. That's not permissible.

11:29:12AM Secondly, this was the subject of a ruling in which the Court did grant -- in fact, granted sanctions. So whatever position the state actually had, this court found was incorrect and granted sanctions and also permitted the additional questioning of these various witnesses. The fact of the matter is this court explicitly found that this was not protected by the work product. So whatever arguments the state wants to make, they cannot make.

MS. POLK: Your Honor, these constant interruptions are totally inappropriate. Detective Diskin testified. And what I'm going to say right now is that our belief his attorneys were not entitled to learn about this meeting was addressed in this court. And that came out in the testimony of Detective Diskin. And that this court ruled and that we moved on and that the defense attorneys got to interview the witnesses. That's all in front of the jury.

MR. LI: Then we should get a jury instruction that the Court ordered that our attorneys' fees be paid --

MS. POLK: Judge, this all came out --

MR. LI: -- the discussions that the county -- the positions that the county attorney took that were improper.

THE COURT: Summaries of what Detective Diskin testified to, that's permissible. The problem is talking about a belief that's not per the evidence. You haven't testified, Ms. Polk.

MS. POLK: I'll say the position that the defense attorneys were not entitled to find out about the meeting was addressed by this court. That's what I'm trying to say. And that came out

through Detective Diskin. This court addressed it, that you ordered that they got to talk to the witnesses, and that's what happened.

THE COURT: I believe that was the testimony, essentially.

MR. LI: It's misleading to leave it at that. This court also granted sanctions because the county attorney took a bad-faith position. That's the facts. So if you want to talk about it, they they're going to have to talk about it all. If they just want to pretend as if it didn't happen like that, they can't.

THE COURT: It's going to come through that Detective Diskin said the Court ordered that there be the follow-up interviews.

MR. KELLY: Just to clarify Detective Diskin's testimony, I did the cross-examination. When I went down this path, Ms. Polk objected, and it was sustained. I was not allowed to tell this jury that the government was sanctioned.

THE COURT: I think it came out. It actually did come out. But it was not -- we're not going to get into the sanctions. It can be admitted. The chronology of what happened that came in through Detective Diskin can be admitted. But this whole

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11:11:06AM medical testimony at all that any of the victims
11:11:09AM died as a result of rat poisoning, which, as you
11:11:14AM learned, would cause a person to bleed to death.
11:11:16AM The defense team wants you to focus on
11:11:18AM all the evidence we did not find and all the
11:11:21AM strange places the evidence did not lead.
11:11:24AM Detective Diskin followed the evidence.
11:11:26AM And there is simply no evidence that pesticides,
11:11:30AM that the wrong wood, or that rat poisons somehow
11:11:36AM caused these deaths.
11:11:39AM I want to talk just briefly about the
11:11:42AM testimony of the Hamiltons. On page 5 of your jury
11:11:50AM instructions you have an instruction that talks
11:11:52AM about the First Amendment. And it says that the
11:11:55AM First Amendment of the United States Constitution
11:11:58AM guarantees every citizen freedom of speech and
11:12:02AM religion. Thus you must not be prejudiced or
11:12:05AM biased for or against Mr. Ray simply because you
11:12:09AM may or may not disagree or dislike the content of
11:12:12AM Mr. Ray's speech, religious and/or spiritual
11:12:16AM beliefs and ideas.
11:12:20AM The First Amendment applies to everyone
11:12:22AM in this country, including the Hamiltons.
11:12:26AM In determining the credibility of
11:12:27AM witnesses, you are not to look at the rights, the

11:12:33AM religious beliefs and the spiritual beliefs of
11:12:36AM witnesses, including Mr. Ray. What you're supposed
11:12:39AM to look at in determining credibility is found on
11:12:42AM page 2 of your jury instructions under the
11:12:45AM instruction called "Credibility of Witnesses."
11:12:49AM This instruction gives you a number of
11:12:51AM factors to look at in determining credibility and
11:12:54AM tells you to consider all of the evidence in light
11:12:56AM of reason, common sense and experience.
11:12:59AM The factors listed in this jury
11:13:05AM instruction about what you should be -- about how
11:13:07AM you should be determining credibility of witnesses
11:13:09AM are, in fact, the same things that Detective Diskin
11:13:13AM told you about from the stand when he testified
11:13:16AM about how does he determine credibility as he's
11:13:19AM going about his investigation and talking to
11:13:23AM witnesses.
11:13:23AM The factors include a witness's ability
11:13:27AM to see or hear the things the witness testified to;
11:13:31AM the quality of the witness's memory; the witness's
11:13:34AM manner while testifying; whether the witness has
11:13:37AM any motive, bias or prejudice; whether they were
11:13:41AM contradicted by prior statements; whether the
11:13:45AM witness was granted an immunity agreement, and the
11:13:48AM reasonableness of the witness's testimony in light